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THE

LAW OF BLASPHEMY:

BEING

A CANDID EXAMINATION OF THE VIEWS OF MR. JUSTICE STEPHEN.

BY

LINDSEY MIDDLETON ASPLAND,

M.A., LL.D., OF THE MIDDLE TEMPLE, BARRISTER-AT-LAW.

WITH AN APPENDIX

CONTAINING

AN ESSAY ON RELIGIOUS OFFENCES INDICTABLE AT COMMON LAW, BY THE LATE EDGAR TAYLOR, F.S.A., 1793-1839

AND THE

SPEECH OF LORD MANSFIELD IN THE HOUSE OF LORDS IN 1767, IN THE CASE OF THE SHERIFFS OF LONDON—CHAMBERLAIN OF LONDON *v.* EVANS.

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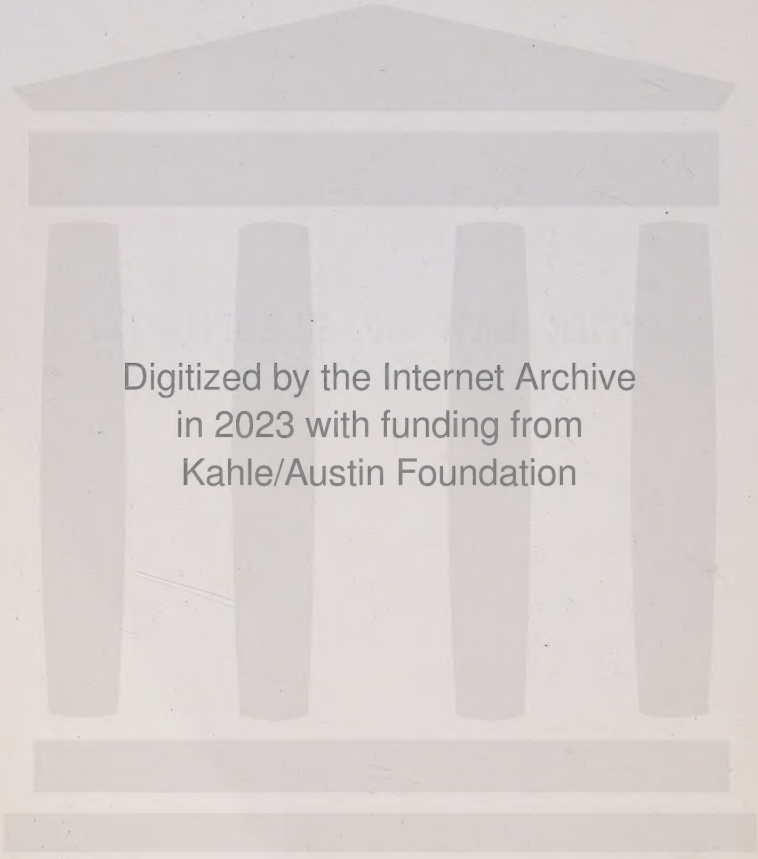

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PREFACE.

Recent events have brought once more into prominence the law relating to blasphemy which had been allowed to remain in obscurity for a quarter of a century. The result is to show that high authorities differ as to what the law is. This is sufficient to make out a case for legislation, and it may be hoped that when legislation has taken place, prosecutions for blasphemy will be heard of no more. The publications which led to the recent trials were of a grossly offensive kind, and were as dull as they were offensive. The effect of repeated prosecutions and severe sentences has been to give greatly increased circulation to some worthless literature, and to excite a sympathy, otherwise quite undeserved, for its publishers. This may be deplored, but it is the inevitable result of such proceedings. The mass of the people have strong instincts of justice, but are incapable of drawing subtle distinctions. They see that it is only against obscure persons holding unpopular opinions that such prosecutions are directed. They suspect, perhaps erroneously but not unnaturally, that those who institute them would have prosecuted Mr. Mill and Dr. Colenso (not to mention living authors), if they had dared. When they are told that the prosecutions are directed not against the opinions expressed but against the offensive manner of expressing them, they feel that the distinction is thin and unsatisfactory, and they fail to understand why the authors of the vulgar brutalities of the *Freethinker* should suffer imprisonment, while the authors of more polished but not more reverent sarcasms against religion and its professors are honoured and rewarded. It is not only the ignorant and unthinking who entertain these objec-

tions to the law. One who had thought much upon the subject, wrote early in the century:—

"A distinction has been sometimes made in this question between *argument* and *ridicule;* let men be permitted, it is said, to reason upon religion, but let them not be tolerated in *deriding* religion or the faith of the majority. We grant that scoffing is indecent and morally criminal, a gross offence against the great law of charity, and that ridicule is a dangerous weapon and rarely well applied; but ridicule will remain as long as there are absurdity and folly in the world, and who shall determine what is fair ridicule and what is malignant scoffing? All men are parties in this cause, and therefore none are fit to be judges. The Roman Catholic will object to Archbishop Tillotson's sermons against the practices of his Church as examples of unbecoming ridicule; and the prophets of Baal no doubt felt resentment against Elijah when he mocked them, and reproached him with blasphemy. The talent, though often abused, has been sometimes well employed in the service of truth. It is not the peculiar property of infidelity and profaneness: instances are well known in which it has been exerted with signal success against banterers and scoffers themselves. And there is no more reason to fear that truth should suffer by ridicule than by argument. At least, nothing is more unlikely to prevent ridicule than a solemn legal enactment or decision against it." *

In the last century Dr. Furneaux, in his celebrated "Letters to Sir W. Blackstone on Toleration," argued similarly with a clearness and force which have never been surpassed. In the following pages, I have ventured to criticise, with freedom, but with the respect due to so eminent a judge, the view of the law of blasphemy held by Mr. Justice Stephen and explained in his learned and valuable "History of the Criminal Law," and more recently in the *Fortnightly Review.* As his view of the law makes the case for legislation much stronger than does my own, and as I entirely agree with his opinions as to what the law ought to be, it is well to state why I question his view. In the first place, I believe the existing law does provide for religious liberty, not so fully as might be desired, but to a very large extent, and I am not willing to give up what is a valuable possession for the uncertain hope of obtaining something better. In the next place, the common law depends on deduction and analogy, and a serious misinterpretation of its principles may lead to unforeseen and mischievous consequences. Looking at the mass of reported decisions which embody the common law, they will be found to contain prin-

* "An Inquiry into the nature of the sin of Blasphemy and into the propriety of regarding it as a Civil Offence," by Robert Aspland, 1817, pp. 78, 79.

ciples which have been from age to age applied to new cases amid every variety of circumstance. The judges have usually shared the opinions and prejudices of their times, and, while they have often been men of wide views and great foresight, have sometimes been the reverse. The current of actual decision has generally flowed in the right direction, but there have been whirlpools and back-currents which may mislead those who do not take a sufficiently comprehensive view. Generally speaking, the decisions of the judges have been wiser than their *dicta*, because in deciding actual cases they have had all the facts before them, and have acted under a sense of responsibility which is wanting in the case of mere remarks falling from the Bench. It is obvious therefore that great caution is required, especially in obscure branches of the law, in applying and still more in *extending* doctrines to be found in the older reports. Especially is this the case with doctrines based upon considerations of public policy. It is possible to carry respect for the reasoning of the judges of a remote age to a length which will not increase respect for the law at the present day. It is true that the legislature may lop off an absurdity from time to time, but it would not be an edifying spectacle to see the Courts constantly reasoning from doubtful premises, to unjust and inconvenient conclusions, in order that the legislature might promptly intervene. It is my object to show that (with some doubtful and practically not very important exceptions) the law of England does recognise the right to think and to speak freely on religious matters. The law of blasphemy exists, no doubt, but it need not be extended so as to conflict seriously with this right. If the true view is, that a man can be convicted of blasphemy only when in the opinion of a jury he has abused this right for some evil purpose of his own, such as the undermining of morality or wanton insult to the feelings of others, the law may be a useless and dangerous one, but it does not *greatly* interfere with religious liberty, and it bears a close analogy to the law relating to political discussion. According to this view *mere* defects of style and manner would not render a man liable to conviction provided his motives were honest. If he argued against religion because he honestly thought it a mischievous delusion diverting men's minds from important realities he would be protected; if he attacked religion merely

because he thought it restrained immorality, or because he maliciously desired to wound the feelings of Christians, he would not. It seems to me that this view of the law conflicts with very few of the decisions, and is in accordance with principle. The view of Mr. Justice Stephen seems to me to conflict with the tenour of modern legislation and decision, to go beyond the authority even of the older decided cases, and in effect to re-establish heresy as a temporal offence. I have added to my own arguments some more important matter borrowed from others. Mr. Edgar Taylor's essay on "Religious Offences indictable at Common Law" was written in consequence of the arguments of Sir Samuel Romilly and Mr. Shadwell and the remarks of Lord Eldon (as to the illegality of Unitarianism) in *Attorney-General* v. *Pearson* * and appeared in the *Monthly Repository* for 1817. It is the work of a sound lawyer, and the accuracy of his views has been subsequently confirmed. Two letters from Sir Samuel Romilly are added, which show how little his heart went with his argument and how much he would have rejoiced at its confutation in the House of Lords in *Shore* v. *Wilson*.† The legislation since 1817 gives wider scope to Mr. Taylor's reasoning, and my task has been little more than to point this out.

The judgment of Lord Mansfield in *Chamberlain of London* v. *Evans* ‡ is included on account of its great value, as it first placed the principle of Toleration on its proper basis. It is contained in books not generally accessible, and is therefore less widely known than it deserves.

L. M. ASPLAND.

* 3 Merivale 355. † 9 Cl. & Fin. 355.
‡ 2 Burn, Ecc. Law, 207. 16 Parl. Hist. 314.

THE

LAW OF BLASPHEMY;

A CANDID EXAMINATION OF THE VIEWS OF MR. JUSTICE STEPHEN.

Mr. Justice Stephen, in the *Fortnightly Review* for March, 1884, declares it to be his opinion "that a large part of the most serious and most important literature of the day is illegal—that, for instance, every bookseller who sells, every one who lends to a friend, a copy of Comte's 'Positive Philosophy,' or of Renan's 'Vie de Jésus,' commits a crime punishable with fine and imprisonment." The deliberate opinion of so eminent a judge is entitled to respectful consideration, however opposed it may be to the impressions of less learned persons. If it be true, it follows that the notion that religious liberty is established in England is a delusion, and that all the legislation of the last two centuries has left in force laws, which if effect were given to them, would involve dire persecution. This, Mr. Justice Stephen not only admits but asserts, and makes it the ground of a demand for further legislation. With his views of what the law ought to be, I entirely concur, but it is not certain that they will be adopted by the legislature, and as I believe that the learned judge has, while intending to expound the law of blasphemy constructed a new law against heresy—a law too which is exceedingly comprehensive and quite undefined, I think it worth while to state my reasons for dissenting from his conclusions. The subject is sufficiently important to deserve consideration from different points of view. The source of what, I venture to think is the serious error, into which Mr. Justice Stephen has fallen, is that he has confined his attention exclusively or mainly, to the authorities, which are neither numerous nor clear, in which certain spoken or written words have been held to amount to blasphemous libels. I do not deny that a logical mind applying itself to some of the reasoning which these cases contain, might fairly deduce from it a theory

approaching to that of the learned judge. If it were permissible to regard his argument as an elaborate *reductio ad absurdum* of the loose reasoning and ill-considered *dicta*, to be found in some of the cases, I should express admiration of it, qualified only by the remark that some of the inferences seem a little strained. But it is not permissible to take that view of it, and regarding it as a serious endeavour to ascertain what the law is, I can only express, with all respect, my surprise both at the conclusion and the mode of reaching it. The learned judge has taken far too narrow a view of his subject; in inquiring into the nature and limits of a law which is admitted to be opposed to religious liberty, he has omitted to pay due attention to the growth of religious liberty. The criticism upon Lord Coleridge's significant remark, that "the law grows" indicates a very imperfect appreciation of its meaning. I should have thought it quite plain that what Lord Coleridge meant was, that religious liberty had grown under the protection of the law, that Acts of Parliament and decisions of high authority had established the rights of free inquiry and expression in religion as in politics, and that therefore doctrines, deducible from judicial dicta but inconsistent with these rights, must be rejected or restrained within narrow limits. This is very different from saying that a judge may do away with a law, *mero motu*, because in his opinion it has ceased to be expedient.

Mr. Justice Stephen argues with perfect candour, though not, as I think, with perfect consistency, and a very fair argument against his conclusion could be based upon admissions which he makes. These are worthy of note; he admits, amongst other things:—

(1) That no case can be produced in which a man has been convicted of a blasphemous libel merely for a perfectly decent denial of the truth of Christianity.

(2) That the Christianity of which Lord Raymond spoke as part of the common law (in the case upon which Mr. Justice Stephen relies) was rather that part of the Christian religion which has an immediate bearing upon conduct than a theological system.

(3) That the law against blasphemy (as he conceives it) was based upon considerations of public policy, *i.e.*, upon the view that a belief in Christianity being essential to the well-being of society, the denial of its truth should be treated as a crime.

(4) That Unitarianism has become a permitted form of religion, and is in no sense of the word illegal.

(5) That the toleration of Judaism proves that the rule deduced

> by him from the cases, is subject to an exception in respect of such striking at the roots of Christianity as is involved in the profession and teaching of the Jewish religion.

The first and second of these admissions are quite enough to raise a doubt whether the doctrine implied in the passage quoted at the commencement of this essay ever was the law of England. The second and third might equally suggest a doubt whether a law so vague and avowedly based on such considerations must not inevitably undergo modification in process of time. The fourth and fifth, as I shall endeavour to show hereafter, are, when their meaning is rightly apprehended, absolutely conclusive against Mr. Justice Stephen's views. The admission that the Christianity which Lord Raymond took under his protection was "rather that part of the Christian religion which has an immediate bearing upon conduct than a theological system," is made under stress of the argument founded on the full recognition now accorded to the rights of the Jews. I doubt its correctness. I should rather suppose that if Lord Hale and Lord Raymond formed any clear idea as to what they meant by "Christianity," and "Christianity in general," when they spoke of it as something which must not be attacked, they meant, not the Christian morality only, but also those doctrines which were held in common by the Church of England and the bulk of the Protestant Dissenters, excluding, on the one hand, what they regarded as Popish superstitions, and, on the other, Arian and other heresies. The admission, however, whether well or ill-founded in fact, is inconsistent with the general tenour of the argument—which is that blasphemy consists in the expression of certain opinions opposed to Christianity. But opinions can be opposed only to other opinions, and opinions about God, Christ, the soul, and the future state, constitute a theological system. It is not true that "a large part of the most serious and important literature of the day" assails that part of the Christian religion which has an immediate bearing upon conduct. I should say that Renan's "Vie de Jésus" does nothing of the kind. The truth is that Mr. Justice Stephen uses the term Christianity in two different senses, neither of which he at all accurately defines. When endeavouring to show that the old doctrine, as he conceives it, is still in force, he is compelled to resort, not a little, to that process of "explaining away" against which, elsewhere, he protests. But when he has passed the dangerous parts of his journey, and arrived at his destination, all this explaining away is forgotten, and the Christianity which is not to be questioned becomes once more a theological system, which is somehow en-

dangered by "a large part of the most serious and most important literature of the day."

I think law-abiding citizens who, on reading Mr. Justice Stephen's argument, naturally desired to make a bonfire of such illegal literature as they possessed, and to avoid committing crimes in future have a right to complain of the absence of any clear statement of the law which under pain of fine and imprisonment they are required to obey. To tell them that a large part of the most serious and important literature of the day is illegal, is like telling them that most of the bread in the bakers' shops contains large doses of arsenic. The statement is more alarming than helpful. Had Mr. Justice Stephen thought it necessary to explain more precisely what the Christianity is, which it is not permissible even reverently to question, he might have been led to doubt his conclusion and retrace his steps. He nowhere formulates the law from which he deduces such momentous consequences. It is true that he says that these follow from Blackstone's definition of blasphemy, but that is hardly the case. Blackstone says:—

"The fourth species of offence, therefore, more immediately against God and religion is that of blasphemy against the Almighty by denying his Being or Providence, or by contumelious reproaches of our Saviour Christ. Whither also may be referred all profane scoffing at the Holy Scripture or exposing it to contempt or ridicule."

According to this definition no doubt all publication of Atheism is unlawful without reference to motive or manner of expression, but there is a marked difference in the other branches of the definition. "Contumelious reproaches" "profane scoffing," "contempt and ridicule" imply something different from serious argument, and an interpretation of the definition which overlooks the force of these expressions is misleading. Having regard to the fact, that in criminal proceedings the law is construed strictly, I think it would be only that very small portion of the most serious literature of the day which is avowedly atheistic, that could be brought within Blackstone's definition. I must call attention to one most extraordinary assumption which Mr. Justice Stephen makes, an assumption which, if it were warrantable, would afford a short cut to the conclusion at which he laboriously arrives. After giving a condensed account of the earlier history of the law relating to offences against religion, he proceeds thus:—

"The next step is that the existing law as to blasphemy and blasphemous libel originated in a recognition by the Court of King's Bench, as being misdemeanours at common law, of *some* of the offences which used to be punished by the Courts of Star Chamber and High Commission. This strongly suggests to

my mind that the Court of King's Bench punished in a different degree, no doubt, and according to a different mode of procedure substantially the *same* offences as had previously been punished by other Courts."

The italics are my own. The inference is an obvious *non sequitur*, and is in glaring opposition to the facts. It was *heresy* that in the great majority of cases was punished by the Ecclesiastical Courts and the Court of High Commission, and an argument which assumes that the King's Bench punished "substantially the same offences" confounds heresy with blasphemy and inevitably leads to a total misapprehension of the true nature of the latter. But Lord Coke, as Mr. Justice Stephen is of course well aware, wrote that "at this day no person can be indicted or impeached for heresy before any temporal judge or other that hath temporal jurisdiction," and Lord Hale and all subsequent authorities say the same. I am anxious not to misrepresent, and therefore observe that from what follows the passage I have quoted, it may be gathered that what Mr. Justice Stephen meant was not that the Court of King's Bench assumed a jurisdiction over offences against religion, *co-extensive* with that of the other Courts, but that in the cases over which the King's Bench assumed jurisdiction, it proceeded on the same grounds as they had done. Admitting this to be the meaning, the inference is equally incorrect. The reasons alleged by the Court of King's Bench for punishing blasphemy are entirely different from those which influenced the Ecclesiastical Courts. Mr. Justice Stephen will not deny that the unhappy victims of the writ *de hæretico comburendo* in the great majority of cases suffered for nothing worse than disputing some part of a theological system. It was not for denying the Being or Providence of God, it was not for reproaching Christ or scoffing at Scripture that they died, but rather because they feared God and reverenced Christ and studied the Bible too devoutly to bow before human authority. To take the two latest victims, was it for questioning "that part of the Christian religion that has an immediate bearing upon conduct," or was it for impugning "a theological system" that Bartholomew Legate and Edward Wightman suffered legal murder at the instigation of Archbishop Abbot in 1612? Although it is consolatory to latter-day heretics to know that they cannot be burned alive, it is with strange emotions that they read an elaborate argument by a distinguished judge, tending to prove that the spirit which actuated these proceedings was transmitted unaltered and unimpaired to the Court of King's Bench and ought to guide and influence the decisions of to-day. Mr. Justice Stephen certainly acts up to his principle of stating a law which he dislikes "in its natural naked deformity." He exhibits something which is naked

and deformed enough, but it requires a good deal more proof than has yet been given, to establish that it is the law of England.

It is quite true that in the seventeenth century and the early part of the eighteenth, the Court of King's Bench took upon itself to act in the character of *custos morum* and to punish some of the offences previously within the jurisdiction of the Ecclesiastical Courts. And the modern doctrine about blasphemy as an offence at common law depends entirely upon the two cases *Taylor's Case* * before Lord Hale in 1676 and *Woolston's Case* † before Lord Raymond in 1728. All the subsequent decisions have been based upon these. Mr. Justice Stephen's doctrine depends upon parts of the reasoning in these cases, not necessary for the decisions, but showing no doubt a strong disposition in the Court to put down attacks on Christianity.

I do not intend to go into a critical examination of these cases which have been sufficiently commented on already. It is admitted that in *Taylor's Case,* and in a less degree in *Woolston's Case,* there was violence and ribaldry in the language used, and therefore they do not *decide* that in the absence of anything of the kind, all attacks on Christianity are illegal, but it is quite open to anyone to argue from the reasons given by the Court, that the judges would have been prepared so to rule if necessary. Taylor was probably mad but the language he used constituted, if he was responsible, blasphemy in the strict sense of the term. From the fact that he was sentenced as part of his punishment to wear when in the pillory a paper with the inscription "For Blasphemous Words tending to the Subversion of all Government," it would seem that the offence was regarded as a sort of sedition. In *Woolston's Case* the defendant had been convicted of publishing discourses on the Miracles of Christ, in which he maintained that they were not to be taken literally but allegorically, and upon his moving in arrest of judgment, "the Court declared they would not suffer it to be debated whether to write against Christianity in general was not an offence punishable in the temporal courts at common law, it having been settled to be so in *Taylor's Case;* they desired it might be noticed that they laid their stress on the word *general,* and did not include disputes between learned men upon particular controverted points." The dictum about Christianity being "parcel of the common law" appears in *Taylor's Case,* and has often been quoted since. It is impossible to say what it means. If it only means that religion is established, and that in judicial oaths and otherwise its importance is recognized, it is a truism quite inadequate to afford any support to the law against blasphemy. Its

* Ventris, 293; Keble, 607.

† Strange, 834; Fitzgibbons, 64.

use, however, slightly tends to support the view that reviling or railing was included in the idea of blasphemy, as it is less absurd to say "existing institutions must not be reviled," than to say, "existing institutions must not be discussed." Probably the best that can be said for it is that Lord Hale, when assuming, for what he thought useful purposes, a new jurisdiction for which there was no precedent, wished to give *some* reason, and picked up somehow or other an expression which had a religious sound, and meant nothing very definite to his own mind. It has been often repeated but never satisfactorily explained. Archbishop Whately said he never met any one who could explain it, and he would probably have remained in the same perplexity if he had lived to read the latest attempt. Mr. Justice Stephen may have guessed correctly what the old judges meant, but he does not explain what they said. He regards the dictum with more approval than I should have anticipated, and thinks it a convenient though inaccurate expression. Its chief value to me seems to be as a sort of danger signal, which indicates that a train of reasoning is about to come into violent collision with Christianity and common sense. Professor De Morgan truly observed, "The dictum that Christianity is 'part and parcel of the law of the land' is abrogated; at the same time, and the coincidence is not an accident, it is becoming somewhat nearer the truth that the law of the land is part and parcel of Christianity."

I think the result of the old cases is very fairly summed up by the Criminal Law Commissioners on their sixth report (1841),* who after referring to *Taylor's Case*, of which they take the same view as I have done, and stating *Woolston's Case*, proceed thus with reference to the latter:—

"It is impossible to contend that this case does not carry the rule to the full extent to which it is stated by Hawkins, Blackstone, East, and other writers, namely, that the common law of England punishes as an offence any general denial of the truth of Christianity, without reference to the language or temper in which such denial is conveyed; and if this be true with reference to revealed religion, those writers are fully justified in assuming as a consequence, though without any express decision on the point, that a denial of the truths of natural religion, such as the Being and Attributes of God, which form the basis of Christianity, must likewise be a crime. We have, therefore, in conformity with these authorities, stated the law in the 'Digest' precisely as it is laid down by them. It is, however, worthy of remark that Woolston's 'Discourses on the Miracles,' which work was the subject of prosecution in the only case in which this doctrine has been maintained, was a book of ribaldry and sarcasm, the temper and manner of which were strongly censured and condemned by some of the celebrated writers of the time, who though they refuted his arguments lamented that the author should be prosecuted. It was, therefore, unnecessary, for the decision of the particular case, that the judges should lay down the rules

* The report is signed by Thomas Starkie, H. Bellenden Ker, and D. Jardine.

so broadly as they have done, and consequently the opinion stated by Lord Raymond, that 'to write generally against Christianity was an offence at common law' was extra-judicial. It was certainly unsupported by any previous decision or judicial opinion which we have been able to discover. We may remark also that all the recorded instances of prosecution for blasphemy since *Woolston's Case* have been publications of indecent and opprobious language against natural or revealed religion; and that in all such cases, the judges, in the remarks they have made upon the offence, have founded their reasons for punishment entirely upon the offensive *manner* of writing in the particular instances, and have cautiously avoided laying down any general prohibitory rule."

I quote this passage because it shows that the Commissioners, while, on the authority of *Woolston's Case* and the text-writers, they adopted Blackstone's definition, were fully aware of the slight basis on which the whole doctrine rested. It also shows that in their opinion the doctrine, so far as it related to Atheism, was an inference from the doctrine about Christianity, and did not rest upon an independent foundation of its own. This would be important if it were necessary to consider how much of Blackstone's doctrine can properly be regarded as valid at the present day. I will further remark that though Lord Raymond's *law* may have authority, it does not follow that his *theology* has any. Mr. Justice Stephen seems to me to attach more importance to his theology than to his law. The *rule of law* laid down was, "It is unlawful to write against Christianity in general, but note specially that this does not include disputes upon controverted points between learned men." The *theology* was, "an allegorical interpretation of the miracles strikes at the root of Christianity." Apply the rule of law to M. Renan and the authors of the "most serious and important literature of the day," and they are reasonably safe. It may be assumed, if their works are "serious and important," that they are learned men, and (unless it is the fact that *all* the learning is on the heterodox side) their controversies with the defenders of orthodoxy will be "disputes upon controverted points between learned men." It is Lord Raymond's *theology* which is required to condemn M. Renan, and that has no authority whatever.

I will now mention another case decided just before *Woolston's Case*, and in the same Court. *Curl's* Case* (1727) was an information exhibited against the defendant for publishing two obscene books. "It was moved in arrest of judgment that this was not an offence within the cognizance of the common law. But after solemn deliberation the Court held it to be an offence properly within its jurisdiction; for they said that religion was part of the common law; and therefore whatever is an offence against that is evidently an

* 1 Barnardiston, 29; 2 Strange, 789.

offence against the common law; *Now morality is the fundamental part of religion, and therefore whatever strikes against that must for the same reason be an offence against the common law. The Case of King and Taylor is to this very point.*" Here then we have the very judges who decided *Woolston's Case* laying down (and surely with good reason) that "morality is the fundamental part of religion," and, therefore, on the authority of *Taylor's Case*, ruling that, "whatever strikes against morality must be an offence against the common law." Now a serious argument in favour (say) of promiscuous intercourse between the sexes, strikes against "morality in general" just in the same way that a serious argument against the truth of the New Testament strikes against "Christianity in general." In both *Woolston's Case* and *Curl's Case* there happened, in different ways, to be indecency of expression, but that we are told is an accident, the material point is the "striking against," in the one case, "the fundamental part of religion," in the other, "Christianity in general." The cases are precisely parallel. If we add that Christianity means "that part of the Christian religion which has an immediate bearing upon conduct" they cease to be parallel, only because they become identical. The conclusion is inevitable that a serious argument expressed in decent language against morality is an indictable offence. I turn to my "Digest of the Criminal Law by Mr. Justice Stephen" in the confident expectation of finding a neat and accurate expression of this rule. But I look in vain. I find it is an offence to publish "any obscene book," and the learned author adds in a note, "I confine this article to obscenity because I have found no authority for the proposition that the publication of a work immoral in the wider sense of the term is an offence. A man might with perfect decency of expression and in complete good faith maintain doctrines as to marriage, the relation of the sexes, the obligation of truthfulness, the nature and limits of the rights of property, &c., which would be regarded as highly immoral by most people, and yet (I think) commit no crime. Obscenity and immorality in this wide sense are entirely distinct from each other. The language used in reference to some of the cases might throw doubt upon this, but I do not think any instance can be given of the punishment of a decent and *bonâ fide* expression of opinions commonly regarded as immoral."* It seems then that the following two propositions may be affirmed:—

(1.) It is unlawful to write in good faith and in decent language

* Since writing the above I have referred to the 3rd ed. of the Digest (1883), and find that the learned author on the authority of *R.* v. *Bradlaugh*, tried before Cockburn, C. J., in 1877, has made an addition to the Digest in the direction I should

against that part of the Christian religion which has an immediate bearing upon conduct.

(2.) It is not unlawful to write in good faith and in decent language against the Christian morality, although that is "the fundamental part of religion." I confess myself perplexed. Until I learn how these two propositions can be reconciled I shall postpone further inquiry into the question whether Lord Coleridge's ruling in *Reg.* v. *Foote* is entirely consistent with the judgments of Lord Hale and Lord Raymond.

I now direct attention to the case of a heretic of a nobler type than Woolston. Edward Elwall was indicted for blasphemy before Mr. Justice Denton at Stafford at the summer assizes in 1726 and was acquitted. The work for which he was indicted had been published some years before and was entitled, "A True Testimony for God and for His Sacred Law; being a plain, honest Defence of the First Commandment of God against all the Trinitarians under Heaven. Thou shalt have no other gods but Me." Elwall was an honest enthusiast, who from a close study of scripture had been led to adopt Anti-Trinitarian opinions mixed with a good deal of Judaism, as he kept Saturday as the Sabbath and opened his shop on Sunday. The clergy prosecuted him for his work which was a very plain and outspoken attack upon the doctrine of the Trinity, based on a somewhat literal interpretation of Scripture. When asked to plead he owned writing the book, but denied being guilty of any evil, and said if he might have the liberty to speak, he believed he should make it manifest to be the plain truth of God. The judge treated him with great consideration, asking if he had been supplied with a copy of the indictment, and when he answered that he had not, offering to postpone the trial. Elwall declined this offer and asked for liberty of speech which was granted him. Then scorning all technical pleas, he recapitulated the argument of his book, citing the Old and New Testaments freely to prove he was right, and denouncing the odious nature of persecution. His sincerity and simple eloquence favourably impressed the Court, and the judge kindly asked him "if he had ever consulted any of our reverend clergy and bishops." Elwall

have anticipated. But the note I have quoted remains with this addition: "I leave this note unaltered, but since it was written the case cited above of *R.* v. *Bradlaugh* may be considered to have gone some way towards establishing a different principle, and to have invested juries to a certain extent with the powers of *ex post facto* censors of the press, so far as such publications on the relations of the sexes are concerned. I think juries ought to exercise such a power with the greatest caution, when a man writes in good faith on a subject of great interest and open to much difference of opinion, and when no indecency of language is used, except such as is necessary to make the matter treated of intelligible." I think this language wise and the caution useful. Every word of it applies *à fortiori* to religious discussions. Why is it not to be so applied?

replied that he had written six letters to the Archbishop of Canterbury and had four from him, but that the Archbishop gave him no satisfaction as he referred him only to Acts of Parliament and Declarations of State. "Well," said the judge, "if his Grace of Canterbury was not able to give you satisfaction, Mr. Elwall, I believe I shall not." Then the judge asked him if he would give a pledge not to write any more upon the subject, which Elwall absolutely refused to do. The judge did not seem displeased with this honest and plain answer: and shortly afterwards he was declared acquitted, and the clerk of the arraigns stood up and said, "Mr. Elwall, you are acquitted, you may go out of Court when you please." I cannot refrain from quoting Elwall's touching account of his conduct on his deliverance. "So I went away through a very great crowd of people (for it was thought there was a thousand people at the trial) and having spoken long, I was athirst so went to a well and drank. Then went out of town by a riverside, and looking about and seeing no one near, I kneeled down on the bank of the river, and sent up my thank-offering to that good God, who had delivered me out of their hands." There is no report of this trial by any legal hand, but Elwall's account bears the impress of truth in every line, and is confirmed by the testimony of an eye-witness. The report is entirely wanting in legal details, and it is doubtful whether any question was left to the jury or whether the judge directed an acquittal. There is little doubt that Elwall (who held no office of which he could be deprived) was indicted for blasphemy at common law and not under the 9 & 10 Will. III., c. 32. As it is impossible to say precisely *how* Elwall escaped the case has of course little legal authority, but it is an interesting historical fact, that as early as 1726, a brave and honest heretic found himself safe in the hands of a humane judge.

To return however from this digression. Of the modern cases which Mr. Justice Stephen cites, the first, *Reg.* v. *Hetherington* * which he thinks "of the first importance," seems to decide nothing beyond this, that there may be blasphemy against the Old Testament as well as the New. With his usual candour, the learned judge sets out the language of the libel, which was violent and scurrilous. If the case be taken as a decision, that it was (and is now) an offence at common law seriously to question the truth or divine authority of anything that is contained in the Old Testament, the result is that

* 5 Jurist, 529. Sir J. Campbell prosecuted, and he said to the jury, "Remember, gentlemen, the distinction between false reasoning against religion and blasphemy. The former is to be answered; the latter is to be put down by the strong arm of the law." A case in which the law is thus stated on behalf of the prosecution is hardly an authority that all reasoning against religion is blasphemy.

the Old Testament is exalted above the New, as it is clear that the Jews are protected in rejecting the divine authority of the New Testament. Moreover, if I mistake not, a powerful argument of the learned judge, when at the Bar, had something to do with the decision of the Privy Council in *Williams* v. *Bishop of Salisbury* * in 1864, which laid down a much less stringent rule in the case of a clergyman. It will, I presume, hardly be contended that a layman is bound to be *more* orthodox than a clergyman, although doubtless in fact many laymen are more orthodox than some clergymen.

The other case, that of *Cowan* v. *Milbourn* †, is no doubt more material. It was there decided that a man who had contracted to let a hall to another for the purpose of lectures, could refuse to carry out the contract, when he found that the subjects of the lectures were announced as "The Character and Teachings of Christ: the former defective and the latter misleading," and "The Bible shown to be no more inspired than any other book." The Lord Chief Baron distinctly said that the former proposition could not be maintained without blasphemy. He also said "it would be a violation of duty on the part of this Court if we were to allow the question to remain for a single moment in doubt." It may be inferred from the similarity of this language to the statement in *Woolston's Case* that "the Court would not suffer it to be debated, &c.," that the Chief Baron had before him that passage in *Woolston's Case*, and adopted it without much consideration and without noting either the important exception made by Lord Raymond, or the great changes legislative and other, which had occurred since his day. There is no probability that any member of the Court of Exchequer had had occasion to consider the law of blasphemy for years. The case was, in itself and apart from the principle involved, an exceedingly trivial one, the damages claimed being only £20. It was decided off-hand after a very superficial argument, in refusing a rule *nisi* for a new trial on an appeal from an inferior Court—the Court of Passage at Liverpool, where the case had been tried before the Recorder. I will only further remark that had the Lord Chief Baron's sense of duty permitted him to doubt for a few moments, it might possibly have occurred to him that it would not help the progress of Christianity to lay down a law which would destroy the *moral* argument in its favour. When the unbeliever is urged to accept Christianity on account of the moral beauty of Christ's character and teachings, the argument implies that these may be tested by some standard external to themselves, and therefore may, in a proper spirit, be discussed. Baron Martin in

* 2 Moore P. C. (N. S.) 375.
† L. R. 2 Ex. 230; 36 L. J. Ex. 124.

concurring said, "I protest against the notion that this is any punishment of the persons advocating these opinions. It is merely the case of the owner of property exercising his rights over its use," which may or may not be satisfactory reasoning but implies dissent from, rather than assent to the Chief Baron's more vehement statement. Baron Bramwell's judgment does the same. It appears from the fuller reports that the Recorder had put to the plaintiff the astute question, whether he had been educated in the Christian religion, and the plaintiff innocently replied in the affirmative, probably not knowing anything about the 9 & 10 Will. III., c. 32, and not seeing the drift of the question. Had he been as astute as his interrogator, he would probably have asked for a definition of the Christian religion before replying, and it may be that if the Recorder had told him that Christianity meant a belief in the doctrines set forth in the 9 & 10 Will. III., c. 32, he might truthfully have replied in the negative. That Act provides that "*If any person, having been educated in, or at any time made profession of the* Christian religion within this realm shall by writing, printing, teaching or advised speaking [deny any one of the persons in the Holy Trinity to be God *] or shall assert or maintain that there are more Gods than one, or shall deny the Christian religion to be true, or the Holy Scriptures of the Old and New Testament to be of divine authority" he shall be subject to severe penalties †. Baron Bramwell based his judgment upon this statute, which, as the plaintiff had been induced to make the admission already mentioned, was probably applicable. The learned Baron also said (not quite consistently perhaps with his first ground which was that the plaintiff was about to commit a *statutable* offence), "It is strange that there should be so much difficulty in making people understand that a thing may be unlawful in the sense that the law will not aid it, and yet that the law will not immediately punish it," which implies that he thought there was no crime. I doubt whether this distinction can apply to the case of speech, which must, I should suppose, be either lawful for all purposes, or unlawful in the sense of being criminal. I am not aware of any authority that a book or a speech which is neither blasphemous, seditious nor immoral, can be regarded as tainted with illegality in any sense. However that may be, Baron Bramwell certainly expresses no concurrence with the Chief Baron, and by seeking for other grounds than his rather implies dissent from the latter. He also made another remark which perhaps had a good

* Repealed by 53 Geo. III. c. 160.

† Mr. Justice Stephen suggests that the late Mr. W. R. Greg might have been convicted under this Act. As Mr. Greg was a member of a Unitarian family, I think, a good defence might have been found.

deal to do with his decision, viz., "I do not regret the result, and on this ground that this placard must have given great pain to many of those who read it."

Beyond the fact, that in deciding, somewhat hastily, a small civil case the Lord Chief Baron repeated the old dicta, this case amounts to very little.

I will add one more to the authorities in favour of intolerance: I cannot say whether Mr. Justice Stephen will regard it as important. It is at least remarkable. In *Briggs* v. *Hartley* * (1850), a testator left a legacy for "the best essay on the subject of natural theology, treating it as a science, and demonstrating the truth, harmony and infallibility of the evidence on which it is founded, and the perfect accordance of such evidence with reason: also demonstrating the adequacy and sufficiency of natural theology when so treated and taught as a science to constitute a true, perfect, and philosophical system of universal religion (analogous to other universal systems of science, such as astronomy, &c.), founded on immutable facts and the works of creation, and beautifully addressed to man's reason and nature, and tending, as other sciences do, but in a higher degree, to inform and elevate his nature, and to render him a wise, happy and exalted being." On the invitation of Mr. Bethell, Vice-Chancellor Shadwell decided that this bequest was void, saying: "I cannot conceive that the bequest in the testator's will is at all consistent with Christianity, and therefore it must fail." This is an express decision, since all the most important changes, and by a judge who had a special acquaintance with such questions, inasmuch as it was he who in 1817 strenuously urged before Lord Eldon that it was an offence, indictable at common law, publicly to impugn the doctrine of the Trinity. It ought therefore to be treated with reverence, and shows that not only is Christianity part of the law, but that Natural Theology should be regarded as a dangerous rival anxious to supplant Christianity, and therefore to be put down by the strong arm of the law. It is far the best authority in favour of the doctrine that "a great part of the most serious and important literature of the day is illegal;" indeed, it would perhaps throw a doubt upon the legality of *any* religious literature except the Bible (unrevised version), and the Book of Common Prayer, since it plainly decides that it is illegal to argue that God's Being, Providence, and Will, can be sufficiently discovered from his works.

With this notable decision, however, should be compared two

* 19 L. J. Ch. 416.

decisions of Lord Romilly. In *Thornton* v. *Howe** (1862), he upheld a bequest for "the printing, publishing, and propagation of the sacred writings of the late Joanna Southcote," although it was argued that they "savoured more of a burlesque than an exposition of revealed religion." Lord Romilly said: "She, from her writings, was a very sincere Christian; but she laboured under the delusion that she would be made the medium of the miraculous birth of a child at an advanced period of her life, and that thereby the advancement of the Christian religion would be promoted." Now let us assume, for a moment, that Lord Romilly, although he held liberal views, may possibly have been right. Compare his law with that of Serjeant Hawkins, who (on the authority of *Naylor's Case*, 5 State Trials, 802) includes amongst blasphemers, "impostors in religion, as falsely pretending to extraordinary commissions from God, &c." Joanna Southcote would certainly have been burned in the sixteenth century, she would have been severely punished and possibly burned in the seventeenth, she would have been punished less severely in the eighteenth, and in the latter half of the nineteenth it is judicially declared that the Court of Chancery will lend its aid to propagate her writings. It would seem, after all, that "the law grows." In *Pare* v. *Clegg* † (1861), the same judge held that there was nothing illegal in a Friendly Society, instituted, amongst other things, for propagating the doctrines of Robert Owen, including such as the following: "Creed and duties of this system, and the Religion of this new moral world. Article 1. That all facts yet known to man indicate that there is an external and internal cause of all existences by the fact of their existence; that the all pervading cause of motion and change in the universe is the power of what the nations of the world have called God, Jehovah, Lord, &c., *but that the facts are yet unknown to man which define what that power is.* 2. That all ceremonial worship by man of this cause whose qualities are so little known proceeds from ignorance of his own nature, and can be of no real utility in practice, and that it is impossible to train men to become rational in their feelings, thoughts, or actions, until all such forms shall cease." Lord Romilly said: "Though it seems that the society is based upon irrational principles, and seeks to realize a visionary and unattainable object, still it is not to be considered as founded for the purpose of propagating irreligious and immoral doctrines in the ordinary and proper sense of those words. It is not such a society as that a person dealing with it could not acquire the right to enforce a contract entered into with him by the society."

* 31 Beav. 14; 31 L. J. Ch. 767. † 29 Beav. 589; 30 L. J. Ch. 742.

Lord Romilly may have been wholly wrong; if he was right, the "law had grown" a good deal since Vice-Chancellor Shadwell's opinions were law—if they ever were—which I venture to doubt.

I will now endeavour to show how the law has grown, by which, for the present purpose, I mean how religious liberty, recognized, protected and established by the law, has grown. The Toleration Act (1 W. & M. c. 18) was a most imperfect measure; it did no more than protect those who, while accepting the doctrines of the Church of England, dissented from her rites and modes of worship. Persons denying the doctrine of the Trinity, and Roman Catholics, were excluded from its benefits. But it recognized, although only to a very limited extent, a *principle* which was far-reaching, and fraught with momentous consequences. It also provided that persons within its protection should not be prosecuted in any ecclesiastical court "for or by reason of their non-conforming to the Church of England." Although, in words of course it is possible to distinguish between bare non-conformity and heresy, it is now quite clear that persons within the protection of the Toleration Acts are not amenable to ecclesiastical jurisdiction for heresy, if, indeed, which is very doubtful, such jurisdiction as regards laymen exists at all.* The Blasphemy Act, 9 & 10 Will. III., c. 32, was a further illustration of the limited *extent* to which, in theory at least, religious toleration was carried in those days.

The next important step was the judgment of the House of Lords in the great case of *Evans* v. *The Chamberlain of London* in 1767.† It had been the practice in the City of London to nominate as sheriffs wealthy Dissenters (who were disabled by the Corporation Act from serving), in order that they might be fined £600 a-piece for not serving under a bye-law of the Corporation imposed in 1748; which fines were appropriated to re-building the Mansion House. Evans was sued in the Sheriff's Court upon this bye-law and judgment given against him, on the ground that he could not disable or excuse himself from serving by alleging that he was a Dissenter within the protection of the Toleration Act, as Nonconformity was still an offence against the law, although the penalties were suspended. This judgment was affirmed by the Recorder in another City Court—the Court of Hustings. But on appeal to the judges they (Chief Baron Parker and Justices Foster, Bathurst, and Wilmot) unanimously reversed it. The case came before the House of Lords, and all the judges who had not already been consulted gave similar

* See 3 Merivale, 385, and Lord Cottenham's speech on Dissenters' Chapels Bill, May 3, 1844.

† 2 Burn. 207; 16 Parl. Hist. 314; 6 Bro. P. C. 181.

opinions, with the solitary exception of Baron Perrott. The speech of Lord Mansfield in moving the judgment of the House of Lords in favour of the Dissenters is one of the most splendid monuments of his wisdom and genius. We have fortunately a report of it revised by himself. It is well known that Lord Mansfield's speech expressed the views of all the judges except Baron Perrott. His motion was unanimously adopted by the House. The judgment is therefore of the highest authority, and its principles have been abundantly recognized in subsequent decisions, although Blackstone in his "Commentaries" used some incorrect and illiberal language inconsistent with it. The speech is one which should be studied by those who wish to understand the law of England and to appreciate one of its greatest exponents. I can only quote a few words containing the pith of the whole. Speaking of the Toleration Act, he said: "It hath been said (by Perrott, B.) that 'the Toleration Act only amounts to an exemption of Protestant Dissenters from the penalties of certain laws,' but this is much too narrow and limited a conception of the Toleration Act, which amounts consequentially to a great deal more than this. . . . . The Toleration Act renders that which was illegal before now legal; the Dissenters' way of worship is permitted and allowed by this Act; it is not only exempted from punishment, but rendered innocent and lawful; it is established; it is put under the protection and not merely under the connivance of the law. . . . . Now there cannot be a plainer position than that the law protects nothing in that very respect in which it is in the eye of the law at the same time a crime."

This marks a great advance. Dissent within the limits of the Toleration Act has ceased to be a crime. It is protected, and in that sense established, by the law. Dissenters are freed from civil and ecclesiastical censures, and the courts of law administer trusts and enforce contracts for the benefit of Dissent because it is no crime. It then became necessary only to *extend* this toleration to dissent from the doctrines, as well as the rites, of the Church, to establish a fairly complete theory of religious liberty.

I pass by the 19 Geo. III. c. 44, and the 52 Geo. III. c. 52, which gave some further relief to Dissenters, but did not expressly extend toleration to persons denying fundamental doctrines, and come to the Unitarian Relief Act, 53 Geo. III. c. 160. By this Act so much of the Toleration Act as excepted persons denying the Trinity from its benefits, and so much of the Blasphemy Act of William III. as related to persons who "deny any one of the Persons in the Holy Trinity to be God" were repealed. Now this Act, which was entitled "An Act to relieve persons who impugn the doctrine of the Holy

Trinity from certain penalties," did not *in terms* do more than relieve Unitarians from the penalties of certain persecuting statutes, and include them in the class of Dissenters protected by the Toleration Act. If it ever were true, that to deny the doctrine of the Trinity was an offence at *common law*, it might be argued that it was so still. Therefore in 1817, in *Att.-Gen.* v. *Pearson*,* it was still open to Mr. Shadwell to contend with pious fervour that Unitarians were liable to fine and imprisonment. Sir Samuel Romilly, who led him, disclaimed agreement with his zealous junior, and more charitably, but perhaps less logically, argued that Unitarianism, though not an indictable offence, was for civil purposes tainted with illegality. Lord Eldon ominously said he had an opinion, but would not say what it was, and without committing himself conveyed pretty clearly the impression that he thought Unitarianism was a crime at common law. Other judges in subsequent cases did much the same. But these doubts were set at rest by the opinions of all the common law judges who were summoned to advise the House of Lords in the great case of Lady Hewley's Charities.† That case was one of great importance, as it affected the title of the Unitarians to all the older chapels and endowments in their possession. It was before the Courts for years, and most of the ability on the Bench and at the Bar was brought to bear upon it. The question of the criminality of Unitarianism at common law was again strenuously argued by Mr. Knight-Bruce; his junior, Mr. Kindersley, urging the milder doctrine of Sir S. Romilly. Sir John Campbell for the Unitarians repudiated either view, and argued that since 1813 Unitarianism had been absolutely free from illegality in any sense of the term. It is important to notice that Sir John Campbell distinctly admitted that the Unitarians deny the Trinity, the Deity of Christ, Original Sin, and the Atonement. That, he said, was not in dispute, and upon that basis the case was argued and decided. The Lords put a number of questions to the judges, amongst others the question whether Unitarians were in the then existing state of the law incapable of partaking of the benefit of such religious charities as those established by Lady Hewley. It appears from the shorthand notes that some discussion took place as to whether the question of the *criminality* of Unitarianism should be separately put, and that the Lords agreed that the question just stated embraced the other. This was in 1839, and the judges' answers were not given till 1842. They all (Mr. Justice Maule, Mr. Justice Erskine, Mr. Justice Coleridge, Mr.

* 3 Merivale, 353.

† *Shore* v. *Wilson*, 9 Clarke & Finnelly, 355.

Justice Williams, Baron Gurney, Baron Parke, and Lord Chief Justice Tindal) answered the question in the negative.

Mr. Justice Maule said: "There is no statute now in force, prohibiting the profession or preaching of Unitarian doctrines, and I have not found any authority to show that it is prohibited at common law."

Mr. Justice Erskine said: "Although the repeal by the statute 53 Geo. III. c. 160 of the incapacities and penalties imposed by the earlier statutes has not made any difference as to the truth or error of their tenets, and cannot, in my opinion, reflect back any light upon Lady Hewley's intention in 1704, it has removed the only obstacle that could have intercepted her bounty if they had been originally objects of it. *It is indeed still blasphemy, punishable at common law, scoffingly or irreverently to ridicule or impugn the doctrines of the Christian faith, and* no one would be allowed to give or claim any pecuniary encouragement for such a purpose: *yet any man may, without subjecting himself to any penal consequences, soberly and reverently examine and question the truth of those doctrines which have been assumed as essential to it.*"

Mr. Justice Coleridge said that (in order to arrive at the same conclusion) it was "not necessary to break in upon any of those *dicta* by which Christianity has been declared parcel of the common law, nor to extend the operation of the different Toleration Acts beyond the literal meaning of their language. But Unitarians profess to be Christians as much, and we doubt not as sincerely as Trinitarians; and *I apprehend that there is nothing unlawful at common law in reverently denying doctrines parcel of Christianity, however fundamental. It would be difficult to draw a line in such matters according to perfect orthodoxy, or to define how far one might depart from it in believing or teaching, without offending the law. The only safe, and, as it seems to me, practical rule, is that which I have pointed out, and which depends on the sobriety and reverence and seriousness with which the teaching or believing, however erroneous, are maintained.*"

Baron Parke agreed "that the preaching of doctrines called Unitarian is not on that account illegal at common law, and all the statutory penalties have been repealed."

Chief Justice Tindal considered that, "since the statute 53 Geo. III. c. 160, all distinction between Unitarians and other Protestant Dissenters as to this purpose is by law taken away."

Here, then, we have the unanimous opinions of seven judges, several of them of the greatest eminence, that Unitarianism is in no sense illegal, although it was admitted that it means the denial of the doctrines of the Trinity, the Deity of Christ, the Atonement, and

Original Sin. Further Mr. Justice Erskine and Mr. Justice Coleridge expressly lay down the law (as the others do by implication) in a manner identical in principle with the summing up in *Reg.* v. *Foote*. It betrays a very inadequate appreciation both of the effect and the weight of these opinions merely to say, as Mr. Justice Stephen does, "various decisions in the Court of Chancery have certainly established the proposition that the profession of Unitarianism is in no sense of the word illegal. The result is that it has by degrees become a permitted form of religion, but this has been by the effect of a definite series of statutes, and not by any unseen process of growth in the law." This is (unintentionally of course) very misleading. The question under investigation is, What constitutes blasphemy at common law? The judges held that honest and conscientious denials of the Trinity, the Deity of Christ, the Atonement, and Original Sin, do not, when combined, make up the offence. The "definite series of statutes" merely relieved the Unitarians from certain penal statutes, from which other Protestant Dissenters had previously been relieved, and left the common law to operate. If this "series of statutes" had any effect upon the common law, it was only *indirectly*, by establishing on a wider and firmer basis the principle of toleration, and so making it impossible to reproduce the old intolerant decisions. That indirect operation the statutes no doubt had, and that indirect operation must go still further. It has simply destroyed the basis of the old law of blasphemy.

The unanimous opinion of the judges in the *Lady Hewley's Case* has not only been recognized in the House of Lords and in other Courts, but has been confirmed by the Legislature. The decision in *Lady Hewley's Case* left the Unitarians unprotected as to all their endowments of earlier date than 1813. The Dissenters' Chapels Act of 1844 (7 & 8 Vict. c. 45) was passed to remedy this. It recites the various Toleration Acts, including the 53 Geo. III. c. 160, and that various endowments had been founded prior to as well as since those Acts respectively, "*which were unlawful prior to the passing of those Acts respectively, but which by those Acts respectively were made no longer unlawful*," and then *enacts* that the endowments prior to those Acts respectively shall be construed as if those Acts had respectively been in force. This statute, therefore, says, "Unitarianism has been lawful since 1813; it was unlawful before, but it shall hereafter be deemed to have been always lawful." It thus carries back the legality of Unitarianism to the time when the old decisions were being given. I should have thought that the opinions in the House of Lords of such judges as I have cited were at least deserving of mention: Nay, I should have thought that their

opinions, when confirmed by the Legislature, were of more weight than an ambiguous *dictum* of Lord Hale, eked out by "what we know of his opinions from other sources." We have now got thus far; that all the leading doctrines of Christianity as commonly received may be questioned. Still the Unitarians, though great heretics, in the eyes of most of the Christian world, call themselves Christians, and Mr. Justice Coleridge was charitable enough to recognize their right to do so. It may be said, therefore, that, in order to be within the protection of the law, men must at least *call* themselves Christians. But the Legislature having gone so far, and knowing well what it was doing, in 1846, by the 9 & 10 Vict. c. 59, placed the Jews on the same footing as the Dissenters. It then became lawful to teach the Jewish religion, although that involves the entire rejection of Christianity as distinct from Judaism. There have been many subsequent Acts, such as the Endowed Schools Act, 1869, which have incidentally recognized the principle of religious liberty, but I have gone far enough for my purpose. It will not be contended that this legislation meant to confer a special privilege of committing blasphemy with impunity, upon certain classes of the community. What it meant was, "Lord Hale and Lord Raymond notwithstanding, it shall be, and it shall be deemed always to have been, the right of every man honestly to form and freely to express his opinions about religion, so long as he abstains from wanton insult to his neighbours." This is the plain result of these Acts and decisions. Lawful dissent includes total denial, with the consequences pointed out by Lord Mansfield. Mr. Justice Stephen feels the force of the argument from the case of the Jews, and to avoid it suggests there must always have been an implied exception in their favour. It so happens that there is distinct authority to the contrary. In *De Costa* v. *De Paz*,* Lord Hardwicke expressly held, on the strength of the cases before Lord Hale and Lord Raymond, that a bequest "for reading the Jewish law, and for advancing and propagating their holy religion" was illegal, because it was "in contradiction to the Christian religion." He further contrasted with the position of the Jews that of the Dissenters under the Toleration Act, saying: "This renders those religions legal, which was not the case of the Jewish religion, that is not taken notice of by any law, but is barely connived at by the Legislature." This was decided in 1744, and was recognized by Lord Eldon in 1818. The passage in Mr. Justice Stephen's article with reference to the case of the Jews is singular. He says: "No doubt this Act (9 & 10 Vict. c. 59) authorises the teaching and preaching of Judaism, and no doubt,

* 2 Swanst. 487.

also, Judaism is opposed *to that part of Christianity which depends upon the life and teachings of Christ;* and the argument is that this shows it can be no longer affirmed that every writing by which 'the root of Christianity is struck at' must be a blasphemous libel. I should doubt whether Judaism 'struck at the root of Christianity.' Judaism is itself one of the roots of Christianity. The Christian doctrine of God, and God's Providence, is the Jewish doctrine of God, and God's Providence. The Christianity of which Lord Raymond spoke, seems to me to have been rather that part of Christianity which has an immediate bearing upon conduct than a theological system." From this it may be gathered that Lord Raymond regarded the "root" of Christianity as of more importance than the tree, and that if only the root were left in the ground the tree might be cut down. Further, we are now somewhat relieved of our fears; it seems that the Christianity which may not be even reverently questioned, is something so impalpable that it would be difficult to commit the offence if we were to try. It is *not* that part of Christianity which depends upon the life and teachings of Christ, and it is *not* a theological system, but it is that part of Christianity which has an immediate bearing upon conduct. From which it would seem to follow that that part of Christianity which has an immediate bearing upon conduct does *not* depend upon the life and teachings of Christ. I fear that what I have ventured to call the "new law against heresy" is becoming itself not a little heretical. It seems that the Christianity, which this law is to protect, is Christianity without Christ and without dogmas. If this is the result, the Unitarian will smile, the Deist will be comforted, and the Positivist will not despair, but the pious bigot will exclaim: "Well, if this is all it comes to we might almost as well have religious liberty after all!" On Mr. Justice Stephen's own showing, it is not Christianity but Judaism or Theism that is protected. It is strange that, instead of all this reasoning from old judicial *dicta*, to results which would be alarming if it were not impossible to state them with sufficient precision to give them any effect, the simple course was not adopted of reverting to the proper meaning of the term blasphemy. Lord Commissioner Whitelock's speech (in Parliament in 1656), in favour of sparing the life of James Naylor,* carefully distinguishes between

* 5 State Trials, 801. It may be said, "Is then an honest and decent avowal of Atheism lawful?" The question is not free from difficulty, as there are no statutes in favour of Atheists, nor are there likely to be. But the rule against Atheism is simply an inference from the old doctrine about Christianity. If this is *gone*, it may be argued that it is not necessary to make a new law in favour of Theism. Vice-Chancellor Shadwell's decision that it is unlawful to teach the sufficiency of Natural Theology, however absurd in itself, shows the difficulty of separating the old doctrine into parts.

heresy which is "Crimen Judicii, an erroneous opinion," and blasphemy which is "Crimen Malitiae, a reviling the name and honour of God." The etymology of the term leads to the conclusion that it denotes slander, or wilful, malignant falsehood against whomsoever directed. The word translated "blaspheme" in the Old Testament is used with reference to the son of the Israelitish woman who "blasphemed the name of the Lord and cursed." Here the sin consisted in cursing God. In the New Testament the chief instances in which the crime is mentioned are (as in the case of the martyr Stephen) those in which it was falsely and ignorantly charged against Christ and his disciples. Where it is used otherwise, it means simply evil speaking, defaming, or railing. In its true sense, there is always an element of real immorality which is totally wanting when the charge is simply denying what a man does not believe to be true. No doubt a doctrine of constructive blasphemy, not unlike the doctrine of constructive treason, may be traced in persecuting times, by which all grave heresies were regarded as blasphemous because they affected the character of the object of worship. By this process Catholics and Protestants in turn denounced each other as blasphemers, and with equal truth. I agree with Mr. Justice Stephen that it would be far better to get rid of the Blasphemy Laws altogether. In the meantime, I believe the true view is expressed in the words of Mr. Starkie: "The law visits not the honest errors, but the malice of mankind." Honest avowals of religious opinions, whether affirmative or negative, are in the nature of privileged communications, and though the law even on this view may be one very difficult to administer impartially, it is yet far preferable to a vague law against Heresy, which rests on no sufficient foundation, and is opposed, not only to the spirit of the English laws, but to fundamental statutes and weighty decisions. In spite of the maxim that "Christianity is part and parcel of the common law," and of the wickedness and folly with which in times past that maxim has been connected, it is still true to say of England that:—

> "It is the land that freemen till,
> That sober-suited Freedom chose,
> The land, where girt with friends or foes
> A man may speak the thing he will;
>
> A land of settled government,
> A land of just and old renown,
> Where Freedom broadens slowly down
> From precedent to precedent."

APPENDIX.

I.

ON RELIGIOUS OFFENCES INDICTABLE AT COMMON LAW.*

THE point having been recently started and argued in one of our Courts, it seems not unimportant to make some inquiry into the supposed common law offence of impugning the doctrine of the Trinity, and this not so much to labour to disprove the argument there used, (which, as it was then put, was certainly not very tenable,) as to take a general view of the subject of offences, by our laws, against God and Religion, and to see what are the leading distinctions in such offences, and the jurisdiction over them, which have been made by the courts and the writers on the subject; in order to clear it, if possible, of its difficulties.

I believe, on investigating the matter, we shall find that all the text writers have very properly divided the consideration of religious offences, into the three following heads, viz.

1. Heresy, or offences against the doctrines of the church.

2. Non-conformity, or offences against the worship and ordinances of the church.

3. Offences against God and religion, in general commonly called blasphemy or profaneness, which are the only indictable offences at common law.

I shall now proceed to make some inquiry into each of these heads, and, I trust, it will appear, that impugning the doctrine of the Trinity, can never have been classed under any other head than that of *heresy*; a branch of the law which is happily now more a matter of antiquarian research than practical utility.

1. *Heresy*, as Blackstone observes, "consists not in a total denial of Christianity, but of some of its essential doctrines publicly and obstinately avowed;" or in the words of Hawkins, (Placit. cor. cap. 2,) "among Protestants is taken to be a false opinion, repugnant to some point of doctrine clearly revealed in Scripture, and either absolutely essential to the Christian faith, or, at least, of most high importance."

It is defined by Hale, to be "sententia rerum divinarum humano sensu excogitata, palam docta et pertinaciter defensa."

There can be no doubt, from the definition of the offence, as well as from the punishment of Arians as heretics, that this is the class to which impugning the doctrine of the Trinity belongs, and it will, therefore, be proper to inquire in whom the cognizance of it has always resided, and what is the present state of the law on the subject.

The jurisdiction over heresy, a crime created, as it were, by the Spiritual Judge, who was the sole arbiter of what opinions were to be so denominated, belonged to the Ecclesiastical Courts from the earliest period. Exorbitant as were their claims of jurisdiction, it is not at all to be wondered that a thing of such "pure spiritualité," should have been confided to them without difficulty.

* By Edgar Taylor, F.S.A., reprinted from the "Monthly Repository" for 1817.

Before the time of William the Conqueror, it is well known that all matters, both spiritual and temporal, were determined in the Hundred Court, before the Aldermen and Bishop, l'un per temporal, l'auter per divine droit, but "ceo fut alter per Roy William (et semble per Parlement car ceo fuit per assent del evesques abbots et touts les princes del realm) car il ordain que l'evesque ou archdeacon ne teneront plea de episcopal leges, et quæ ad animam pertinent en le hundred, mes solonque les episcopal leges et canons—tout ceo appiert per le charte de Roy William. Irrot. 2 R. 2, pro Decano et cap. Eccles. Lincolne. Jan. Aug. 76-77." (See Rolls. Ab. 2. 216.)

The statute of circumspecte agatis directs "non puniend' eos si placitum tenuerint in curia Christianitatis de his quæ meré sunt spiritualia."

In his note upon this passage, Lord Coke says, (Inst. 2, 488,) "Britton saith que seint eglise eyt conusance de juger de pure spiritualité—heresie, schismes, holy orders and the like are mere spiritual thinges."

The spiritual courts had thus, it appears, early acquired the sole controul of the undefined crime of heresy; but they had no power of imprisoning or proceeding temporally against the offender for a long time.

The conviction seems to have been before the Archbishop in a provincial synod, and not in any petty ecclesiastical court, (Blackstone, IV. 46,) and the writ, de hæretico comburendo, was issued by the King in council, who had, however, a discretion on the subject, the writ not being of course, but issuing only by his special direction.

In 5 Richard II. an attempt was made by the clergy to obtain assistance from the temporal authorities, in punishing this crime, and an act still appears on our statute book, being stat. 2, c. 5, by which sheriffs are commanded to apprehend preachers of heresie and their abettors, and the enormities ensuing such preachings are declared. There are, however, great grounds for discrediting the authenticity of this statute, and Lord Coke, in particular, (Inst. 3, p. 40,) says, "The Commons, in the next parliament, preferred a bill, reciting the said supposed act, and constantly affirmed that they never consented thereunto, and therefore desired that the said supposed act might be anienled and declared to be void; for they protested that it never was their intent to be justified, and to bind themselves and their successors to the prelates more than their ancestors had done." Notwithstanding this manly stand against the encroachment of the church, the clergy carried their point so far as to continue the act on the statute book, although it had never the assent of the Commons, and does not appear ever to have been acted upon.

In the reign of Henry the Fourth, however, the clergy, irritated by the spread of Lollardy, and "taking advantage of the King's dubious title, to demand an increase of their power, obtained the act, 2 Hen. IV. c. 15, which sharpened the edge of persecution to its utmost keenness." (Blackstone, IV. 47.) By this statute, (according to the abridgment of it in the statute book,) "the orthodoxy of the Church of England was asserted," and thus some progress was made towards defining the crime of heresy; the jurisdiction of the church over it was also increased, because by it the diocesan was empowered, without the aid of a synod, to convict, and unless the offender abjured, the Sheriff was bound ex officio, if required by the Bishop, to commit him to the flames without waiting the consent of the crown.

Lord Coke (3 Inst. 39), shews at considerable length, that the Ecclesiastical Court alone had the jurisdiction over heresy before this statute, as appeared by the preamble to it, and that it was made only to give the diocesan assistance in enforcing the ecclesiastical censures. "From this act," says he, "and other acts and authorities quoted in the margent, these two conclusions are to be gathered: first, that the diocesan hath jurisdiction of heresy, and so it hath been put in use in all Queen Elizabeth's reign, and accordingly so resolved by the judges, Hil. 9

James I. in the case of Legate. Secondly, that without the aid of that act the diocesan could imprison no person accused of heresy, but was to proceed against him by the censures of the church."

The clergy seem to have made good use of this statute, though, as will soon be seen, their authority was still thought not sufficiently ample. The first case under it that is reported, seems to be that of Master Thorpe, (8 Hen. IV. A. D. 1407, reported in State Trials, Vol. I. p. 17,) who was tried (if we can with any propriety use the word) before the Archbishop of Canterbury, who was then *Lord Chancellor* also. Thorpe was a disciple of Wickliffe, and the Archbishop appears to have seized him on the certificate of the bailiff of Shrewsbury "witnessing the errors and heresies that this losel had venomously sown there," (which are mentioned here, only to show how undefined the crime of heresy was,) viz. "That the sacrament of the altar, after consecration, was material bread—that images should in no wise be worshipped—that men should not go on pilgrimages —*that priests have no title to tythes*—that it is not lawful for to swear in anywise."

The issue of the examination or trial was, that the Archbishop makes use of the power given by the late act, and "bade *the constable* to have him forth thence in haste, and he was brought unto a foul and dishonest prison."

It is wandering, perhaps, from our purpose, but I cannot refrain from quoting the two following passages, as exemplifying the styles and tempers of the persecutor and persecuted.—Archbishop. "Lo, Sirs! this is the manner and business of this losel and such other, to pick out sharp sentences of Holy Scripture, and of doctors, to maintain their sect and lore against the ordinances of holy church. And, therefore, losel, it is that thou covetest to have that Psalter that I made to be taken from thee at Canterbury, to record sharp verses against us; but thou shalt never have that Psalter nor none other book, till I know that thy heart and thy mouth accord fully to be governed by holy church." A dispute arising about what was this holy church, Thorpe, in answer to the Archbishop's question on the subject, says, "The holy church be ever one in charity, yet it hath two parts; the first and principal part hath overcomen perfectly all the wretchedness of this life, and reigneth joyfully in heaven with Christ, and the tother part is here yet in earth, busily and continually fighting, day and night, against temptations of the fiend, forsaking and hating the prosperity of this world, despising and withstanding their fleshly lusts; which only are the pilgrims of Christ, wandering toward heaven by stedfast faith and grounded hope and by perfect charity—for these heavenly pilgrims may not nor will not be letted of their good purpose, by the reason of any doctors discording from holy Scripture, nor by the floods of any tribulation temporal, nor by the wind of any pride of boast, nor of menacing of any creature, for they are all fast grounded upon the sure stone Christ, hearing his word and loving it, exercising themselves faithfully and continually in all their wits to do thereafter."

The trial of Oldcastle, Lord Cobham, followed, in 1 Hen. V. A. D. 1413. (See State Trials, Vol. I.) This was also a proceeding for similar offences in the Ecclesiastical Court, and it appears at the end of the report, that this case gave occasion to the parliament passing the second heresy act, viz. 2 Hen. V. c. 7, by which Lollardy was made a *temporal*, as well as a spiritual offence, indictable in the King's Courts, which, as Blackstone observes, "did not thereby gain an exclusive, but only a concurrent jurisdiction with the Bishop's consistory." Before this statute, however, it is perfectly clear that heresy was a mere spiritual offence, to which state it was brought back by the subsequent repeal of this act. There was no common law forfeiture of goods, &c., on conviction for heresy, till the stat. 2 Hen. V. "because the proceeding therein is merely spiritual, pro salute animæ, and in a court that is no court of record, and, therefore, the conviction of heresy worketh no forfeiture of anything that is temporal." (Coke, 3 Inst. 41.)

Lord Coke describes the kind of proceedings which took place by indictment,

under this statute, against Lollardy, "which opinions," he adds, "were so far from heresy, as the makers of the statute of 1 Elizabeth had great cause to limit what heresy was." They then indicted offenders in general words, for writing "falsas billas et scripturas seditiosas et nonnulla fidei et doctrinæ Christianæ contraria continentes," &c. "which indictments also," he observes, "were utterly insufficient in law." The spiritual courts also proceeded against offenders, though the Court of King's Bench frequently interfered by habeas corpus to prevent the abuse of their authority. In particular, in Mic. 5 Edw. IV. 143, the case of John Keyser occurred, as mentioned by Lord Coke, (3 Inst. 41,) who was brought up and discharged by Sir John Markham, as having committed no heresy within the statute. The offence for which he was committed by the Archbishop, seems to have been neither more nor less than that of doubting the effect of excommunication on his wheat crop, upon which the Archbishop appears to have thought it would operate as a blight. Having been excommunicated, "the said Keyser openly affirmed that the said sentence was not to be feared, neither did he fear it. 'And Albert, the Archbishop, or his commissary, hath excommunicated me, yet before God I am not excommunicated;' and he said he spake nothing but the truth, and so it appeared, for that the last harvest (standing so excommunicate), he had as great plenty of wheat and other grain as any of his neighbours, saying to them in scorn, (as was urged against him,) that a man excommunicate should not have such plenty of wheat."

Heresy continued cognizable in this manner for a long period, and the next material feature in its history, is the necessity which the reformation created, of defining it a little more according to the existing standard of orthodoxy. The stat. of 25 Hen. VIII. c. 14, was then passed, which repealed the 2 Hen. IV. c. 15, and took all offences against the Church of Rome out of the list of heresies, and the ordinary was in other ways shackled in his jurisdiction, in order to give the temporal power a controul over his measures. And yet, as Blackstone observes, "the spirit of persecution was not abated, and only diverted into a lay channel," for 31 Hen. VIII. was passed an act, entitled, "An Act for Abolishing Diversity of Opinions in certain Articles of Religion," commonly styled the bloody law of the Six Articles, by which certain points of popery, the impugning of which had just been declared no heresy, "were determined and resolved by the most godly study and pain of his Majesty;" and impugners of some of these points were declared heretics, and to be burnt, and of others to be *felons* and suffer death. A motley jurisdiction was also established, combined of the spiritual and temporal powers, for the trial of such heresies. In the reign of Edward VI. a more liberal spirit appeared for the moment, and an act was passed in the first year of his reign, c. 12, "the most admirable and excellent statute ever passed by the English legislature," which, amongst other things, repealed "all and every act of parliament concerning doctrine or matters of religion." This might, indeed, be styled an act of toleration, but its duration was short, for soon after was passed the Act of Uniformity, which falls more properly under our second head.

In the reign of Mary all the acts for suppression of heresy were fully revived, and enforced, it is needless to observe, in their full rigour; but in the reign of Elizabeth a great change took place both in the definition of the offence and the jurisdiction over it. The 1 Eliz. c. 1, was the first legislative measure of her reign, and by it all the laws for assisting the ecclesiastical jurisdiction, and creating the temporal jurisdiction over heresy, were abolished.

It was declared that no tenets should be considered heretical by the High Commission Court, established by the act, but those which had been settled to be so; first, by the words of the Canonical Scriptures; or, second, by the first four general councils, or such others as have only used the words of Scripture; or, third, which should hereafter be declared such by parliament, with the assent

of the clergy in convocation. This statute restored the old ecclesiastical jurisdiction over heresy, as it stood previous to the several statutes on that subject. "So that no statute (as Lord Coke observes), standeth now in force, and at this day no person can be indicted or impeached for heresy, before any temporal judge or other that hath temporal jurisdiction." This statute, however, also appointed a court of high commissioners, to whom a jurisdiction was given over heresies, errors, schisms, abuses, &c., under a restriction against declaring any thing to be heresy, but the points above-mentioned, which restriction has generally been considered as good direction to the common ecclesiastic courts, although applied by the statute only to the court of high commission, which was abolished by 16 Car. I. c. 11. (Burn's Eccles. Law, Tit. Heresy.)

The old jurisdiction was, however, found (notwithstanding the vague limits which were placed by this statute), to be by no means a dead letter. In the 17 Elizabeth, two Anabaptists, and in the 9 James I. two *impugners of the doctrine of the Trinity*, suffered under the writ de hæretico comburendo.

It may be proper to notice two cases which occurred at this period, and which appear to have been attempts to establish in effect a sort of temporal jurisdiction over heresy, by considering the maintenance of heretical opinions, under the light of a breach of the peace; they can hardly be considered, however, as establishing any principle, particularly under the circumstances of the cases and the time of their occurrence. The one was before the Star-chamber, and the other seems to have been much doubted, and to have had the opinion of the court and even the Attorney General against it, and in both, the courts took special care to decide upon the principle of the seditious and inflammatory tendency towards a breach of the peace, of which, of course, a jury would always be the judge.

The first is Attwood's case, 15 Jas. I. Cro. Jac. 421. It was error brought by him to reverse a judgment, upon an indictment before Justices of the Peace, for scandalous words. "That the religion now professed was a new religion, preaching was but prattling," &c. The error assigned was, that *the offence was not inquirable by indictment*, and before Justices of the Peace, *but only before the High Commissioners.* It was referred to the Attorney General to inquire if the offence was inquirable there, and he certified that it was not, and of that opinion, it is said, was the court, but they would inquire. From 2 Roll. 78, it appears, however, that, by some means, the opinion of the court altered, and considered the words as scandalous and indictable, not, however, for their religious tendency, but as a breach of the peace.

The other case was Traske's case, (Hob. 236,) in the Star-chamber, for maintaining Judaizing opinions, "being called ore tenus; he was sentenced to fine and imprisonment, *not for holding those opinions*, (*for those were examinable in the Ecclesiastical Courts, not here*,) but for making of conventicles and factions, by that means which may tend to sedition and commotion, and for scandalizing the King, the Bishops," &c.

The next important change in the law of heresy was made by the 29 Car. II. c. 9, by which the writ de hæretico comburendo, was abolished, and the offence was subjected only to ecclesiastical censures, pro salute animæ, and all harassing with temporal penalties was put an end to. Such censures, however, were not to be regarded as a trifling punishment upon the offender if put in full force, and toleration of diversity of opinion was still very incomplete.

The stat. of 1 William and Mary, c. 18, made for the purpose of giving "some ease to scrupulous consciences," effected very little difference in the condition of persons who wished to think for themselves in religious matters. Freedom of opinion and the right of private judgment, seem to have been as little understood, or rather as much deprecated by Dissenters as Churchmen; and, accordingly, the Toleration Act did little more than enable good Churchmen, in

point of *doctrine*, to dissent from the *government* and ordinances of the church, and required a subscription to all the doctrinal articles of its faith, expressly providing, that persons who impugned the doctrine of the Trinity should not be considered as taking any relief under it. It, however, provided, that as far as it permitted diversity of faith and worship, the ecclesiastical courts should not interfere with any prosecutions.

The exception of impugners of the Trinity from the benefits of this toleration, and the censures of the ecclesiastical courts to which they were left exposed, were still not considered sufficient to repress this heresy, "very prevalent," as Blackstone says, "in modern times;" and the stat. of the 9 and 10 William III. c. 32, was passed, which once more revived the temporal jurisdiction over this species of heresy, and imposed very heavy penalties against all impugners of the doctrine of the Holy Trinity, who were made indictable under it, in the King's Courts; which seem, in this instance, as observed by Blackstone, in the case of 2 Hen. V. c. 7, to have gained not an exclusive but a concurrent jurisdiction over the offence with the ecclesiastical courts.

I have classed this statute under the legal head of heresy, because there can be no doubt that it is under that head that the offence against which it was directed, had always been punished, and accordingly, this method has been pursued by Hawkins, East, Blackstone, and, I believe, all our text writers on this subject. The latter observes, "the legislature hath thought it proper that the civil magistrate should again interpose with regard to one species of heresy," &c. It will be more proper to consider, under our third head, whether this Act can be considered as declaratory of an offence of a different species, originally indictable at common law, and whether it has ever been treated as such; only observing here, that the word blasphemy, in the title of the Act, does not seem at all to affect the nature of the offence, that being a term very ill, or rather not at all defined in our law, and, applied, in most instances, as an epithet of reproach against speculative differences, from the established faith, as well as opinions hostile to religion in general.

The measure of intolerance, so far as regards opinion on *doctrinal points*, seems therefore, to have been very full, notwithstanding the boasted Act of Toleration, as it is called, and continued so for a long period, till at length, by the 19 Geo. III. c. 44, the benefit of the Toleration Act, and, of consequence, the suspension of ecclesiastical prosecution, are extended to those who, instead of subscribing the articles, merely sign a declaration of their belief that the Scriptures contain the revealed will of God. Though impugners of the doctrine of the Trinity were still excepted from the benefit of this Act, the power of the Ecclesiastial Courts was materially abridged by it, and seems to be now almost, if not altogether, destroyed by the 53 Geo. III. which repeals the excepting clause, and thus appears to put an end to any prosecution for heresy, against persons who comply with the provisions of the Toleration Act, as enlarged and extended by the 19 Geo. III.

By the same statute of the 53 Geo. III. the temporal punishment imposed by the 9 and 10 William III. was abolished, and thus ended all common law jurisdiction over heresy.

2. Non-conformity, and Offences against the Ordinances and Worship of the Established Church. It seems unnecessary to enter minutely into the history of this offence, as it had no farther existence than the authority of the statutes which created it, and died with them.

"My Lords," said Lord Mansfield, (in his memorable speech in the House of Lords, in the case of Evans, reported by Dr. Furneaux,) "there never was a single instance, from the Saxon times down to our own, in which a man was ever punished for erroneous opinions concerning rites or modes of worship, *but upon some* positive law. The common law of England, which is only common reason or usage, knows of no prosecution for mere opinions. For Atheism, blasphemy and

reviling the Christian religion, there have been instances of persons prosecuted and punished upon the common law; but bare non-conformity is no sin by the common law, and all positive laws inflicting any pains or penalties for non-conformity to the established rites and modes, are repealed by the Act of Toleration, and Dissenters are thereby exempted from all ecclesiastical censures."

This seems to be now the settled law on the subject, and, accordingly, the courts have acted upon it in many cases, as well as the above of Evans; the statute of superstitious uses is considered as virtually repealed by it, so far as relates to Dissenters, and the Court of Chancery now administers trusts for the support of their worships, which were, previous to the Toleration Act, bad. The enlargement of this Act, by the 19 Geo. III. and the repeal of the clause excepting impugners of the doctrine of the Trinity, by the 53 Geo. III. has placed Dissenters from the doctrine of the church, on an equal footing with those who only dissent from its worship; and its provisions have not only exempted "their way of worship," in the words of Lord Mansfield, "from punishment, but rendered it innocent and lawful; have put it not merely under the connivance, but, under the protection of the law, have *established* it. For nothing can be plainer, than that the law protects nothing in that very respect, in which it is, at the same time, in the eye of the law, a crime."

An opinion contrary to this has, however, been sustained by considerable authority, and particularly by Blackstone, who says, "that the crime of non-conformity is by no means abrogated." Baron Perrott, in Evans's case, in opposition to all the other judges, contended, that the Toleration Act amounted to nothing more than an exemption from the penalties of certain laws then particularly mentioned; an opinion which has been most extraordinarily revived by the present Lord Chancellor, and expressed in the same words, only a few days ago, in the case of the Attorney General, on the relation of Maunder v. Pearson, reported in your July Number. But this opinion has never been adopted in practice, and, on the contrary, it has been repeatedly decided by the unanimous judgment of judges and parliament, "that the Toleration Act removed the crime, as well as the penalty of non-conformity."

The whole subject has been ably commented upon, and enforced by Dr. Furneaux, in his letters to Blackstone.

Under this head, then, there can be no doubt that, as Dissenters, impugners of the doctrine of the Trinity stand, in common with the rest of their brethren, clear, not only of penalty, but of crime in the eye of the law, and protected as amply in the exercise of their worship as others; and on this part of the subject it will, therefore, be manifest, not only that this class of Dissenters are unaffected by any common law, or statute offence as non-conformists, but that if they are protected and their worship established under the provisions and restrictions of express statutes, as they undoubtedly are, that circumstance will furnish strong additional ground to contend that the law, when it placed them in that situation and repealed all express enactment against them, could not mean to consider them as indictable at common law for the expression of opinions, in the free exercise of which they are sanctioned and protected.

There are some other offences which are also to be classed under this head, created by statutes still in force for the protection of the worship of the Established Church, particularly the 1 Eliz. c. 2, which prohibits railing attacks on the Common Prayer Book; to which protection (when the point of an establishment of a particular religion and form of worship is conceded), there does not seem much objection, and it appears to me, therefore, that Blackstone has not at all merited the censure that has been lavished upon him for his defence of this statute.

3. We come to the head of Offences against God and Religion in general, which are the only offences indictable at common law, and under which head, therefore, as we have seen, must be included the impugning the doctrine of the Trinity, if it is to be considered as an offence at common law.

In the first place, it will be expedient to look at the description or definition of this offence, as given by our text writers, in order to ascertain as well as we can, some principle on which this branch of common law jurisdiction proceeds. We shall then investigate the different cases on the subject, to discover how far they establish it, and from thence our way will be clear to see whether the simple impugning of the doctrine of the Trinity comes within that principle, and the cases on which it is founded.

It may be proper, first, however, to observe, that this branch of the common law, although depending on a very ancient principle of interference, viz. the breach of the peace, is of comparatively modern date in practice: and on the subject, our old law books are therefore perfectly silent—the cognizance of the offence having, in fact, till of late resided in the ecclesiastical courts only, to which, as far as regarded the expression of opinion on religious subjects, it undoubtedly exclusively belonged; and we shall accordingly find, that when the common law jurisdiction began to be enforced, the ground on which the temporal courts took up the offence, was much debated, and the boundary of their authority laid down with considerable precision. Hawkins (Pleas of the Crown, ch. 5), thus enumerates the offences of this kind. 1. "All blasphemies against God, as denying his being or providence, and all contumelious reproaches of Jesus Christ," for which he cites 1 Ven. p. 293. 3 Keb. pp. 607, 621. 2. "All profane scoffing at the Holy Scripture, or exposing any part thereof to contempt or ridicule." 3. "Impostures of religion," &c., for which he cites Nailor's case, &c. 4. "Certain immoralities." And he states the principle on which these offences are so considered to be as follows: "Offences of this nature, *because they tend to subvert all religion or morality, which are the foundation of government*, are punishable by the temporal judges with fine," &c. 5. "Seditious words in derogation of the established religion are indictable, as tending to a breach of the peace," for which he cites the case above noted, namely Atwood's case, Cro. Ja. 421, which seems to be the only case on the subject, and as we have seen is of rather doubtful authority, though it certainly is not at all material to our purpose to contend that attacks on the established religion, or any other part of our constitution, ought not to be restrained within the bounds of order and decency.

This description and enumeration of offences, is repeated with little variation by East and by Burn in his Ecclesiastical Law, Title, Profaneness.

Blackstone's definition is much to the same effect: "The fourth species of offences more immediately against God and religion, is that of blasphemy against the Almighty, by denying his being or providence; or by contumelious reproaches of our Saviour Christ. Whither also may be referred, all profane scoffing at the Holy Scriptures, or exposing them to contempt and ridicule. These are offences punishable at common law by fine, &c., for Christianity is part of the laws of England." Vol. iv. 59. And the same writer has, in a previous part of the same chapter, illustrated this subject by the following observations on apostacy: "The belief of a future state of rewards and punishment; the entertaining just ideas of the moral attributes of the Supreme Being; and a firm persuasion that he superintends, and will finally compensate, every action in human life (all which are clearly revealed in the doctrines, and forcibly inculcated by the precepts, of our Saviour Christ); these are the grand foundation of all judicial oaths, which call God to witness the truth of those facts, which perhaps may be only known to him and the party attesting. All moral evidence, therefore, all confidence in human veracity, must be weakened by apostacy, and overthrown by total infidelity. Wherefore all affronts to Christianity, or endeavours to depreciate its efficacy, in those who have once professed it, are highly deserving of censure." To oppose "such principles as destroyed all moral obligation," he adds, "it was enacted by Stat. 9 and 10 Wm. III. c. 32," (the part of the statute relating to the doctrine of the Trinity being not here noticed by the Commentator, but inserted in its

proper place, under the head of Heresy,) "That if any person educated, &c. in the Christian religion, shall by writing, &c. deny the Christian religion to be true, or the Holy Scriptures to be of divine authority, he shall, &c."

It is not our business to stop to expose the equivocation and glaring weakness of the above reasoning, so ably animadverted on by Dr. Furneaux. Granting the learned Commentator the whole extent of his argument, it aims at establishing no principle with which Unitarians, quasi Unitarians, can at all quarrel; all that he contends for, being, that Christianity in general is parcel of the laws of England, and that they will defend it from attacks which threaten the dissolution of its moral obligations. We can, as Unitarian Dissenters, have no objection to the principle for which he quotes the words of Cicero: "Utiles esse opiniones has quis neget, cum intelligat, quam multa firmentur jurejurando; quantæ salutis sint fœderum religiones; quam multos divini supplicii metus a scelere revocarit, quamque sancta sit societas civium inter ipsos, Diis immortalibus interpositis tum judicibus tum testibus?"

I shall add to these quotations from our text writers, the words of Mr. Holt, in his Law of Libel, p. 64: "The first grand offence of speech and writing, is speaking blasphemously against God, or reproachfully concerning religion, *with an intent to subvert man's faith, or to impair his reverence of him.*"

Mr. Starkie, in his treatise on the Law of Libel, p. 486, says, "It is the close connexion between moral obligation and opinions on religious and theological topics, which, as it were, invests the temporal courts with jurisdiction over the latter, which are apparently of mere spiritual concern. The importance of this relation is strongly illustrated in the instance of judicial oaths." "Upon the dangerous temporal consequences likely to proceed from the removal of religious and moral restraints, the punishment for blasphemous, profane, and immoral publications is founded." "Blasphemy against the Almighty, by denying his being, or providence, contumelious reflections upon the life and character of Jesus Christ, and in general, flippant and indecorous remarks upon the Holy Scriptures, are offences at common law; for Christianity, it has been said, is a part of that law."

Enough has been said to shew the ground on which the temporal courts interfere, viz. the necessity of the maintenance of religion in general, as the bond of moral obligation, and the tendency of the opinion maintained to weaken that bond; and even to this extent, it appears now to be considered to be a necessary ingredient that the attack should be indecent and disorderly, in order to bring it within the proper scope of the temporal courts. "The law does not prohibit reasonable controversy, even upon fundamental subjects, so long as it is conducted with a tone of moderation, which shews that argument is the only purpose; the writer abstaining from terms which are abusive and passionate, and therein indecorous towards the establishment, and offensive to the consciences of individuals." "What is argumentative may very properly be left to be replied to by argument; what is passionate, &c. cannot be so safely passed over; such a suffrance would be the endurance of brawls. When the law is moved against such writers, it is not persecution, it is a defence of the public tranquillity and decency."—Holt.

The following passages also from Mr. Starkie's book, pp. 495, 496, express the same opinion: "Both the language of the indictments, therefore, and the guarded expression of the court in the above case (Woolston's), shew that it was never a crime in the contemplation of the law, seriously and conscientiously to discuss theological and religious topics, though in the course of such discussions doubts may have been both created and expressed on doctrinal points, and the force of a particular piece of scriptural evidence casually weakened." "Upon the whole, it may be not going too far to infer from these principles and decisions, that no author or preacher, who fairly and conscientiously promulgates the opinions, with whose truth he is impressed, for the benefit of others, is, for so doing, amenable as a criminal."

In Lord Erskine's speech in the case of the King v. Williams, he observed, that "Every man has a right to investigate with reason controversial points of the Christian religion; but no man, consistently with a law which only exists under its sanctions, has a right to deny its very existence, and to pour forth such shocking and insulting invectives as the lowest establishments in the gradations of civil authority ought not to be subjected to, and which would soon be borne down by violence and disobedience, if they were."

We will now proceed to the cases which have established and laid down the principle of temporal interference, and which are not very numerous. The first is Taylor's case. 1 Ventr. 293. Hil. Term, 27 and 28 Car. II. (the year before the writ de hæretico comburendo, was abolished), before Chief Justice Hale. It was "an information exhibited in the Crown Office, for uttering blasphemous expressions, such as that Jesus Christ was a bastard, religion was a cheat, &c. Hale said, that such kind of wicked blasphemous words were not only an offence to God and religion, but a crime against the laws, state and government, and *therefore*, punishable in this court. *For, to say religion is a cheat, is to dissolve all moral obligation whereby civil societies are preserved*, and that Christianity is parcel of the law, and therefore to reproach the Christian religion, is to speak in subversion of the law." The same case is reported, 3 Keb. 607—621, and Hale is there reported to have said, "these words, *though of ecclesiastical cognizance*, yet that religion is a cheat, *tends to the dissolution of all government*, and *therefore* punishable here." "For taking away religion, all *obligation to government*, by oaths, &c. *ceaseth*, and *Christian religion* is part of the law itself, therefore injuries to God are as punishable as to the King or any common person." The next case which occurred was that of Curl, in which the power of the temporal courts was disputed, and the ground of their interference expressly declared. This case is reported in 2 Strange, 789, 1 Geo. II. before Raymond, Chief Justice. "It was an information against defendant, for printing and publishing a lewd and obscene book; the defendant moved in arrest of judgment, contending that, however he might be punished for this in the spiritual court, as an offence contra bonos mores, yet it would not be a libel for which he was punishable in the temporal courts. The Attorney General contended, that it was an offence at common law, as it tended to corrupt the morals of the King's subjects, and is against the peace of the King. Peace, he observed, includes good order and government, and may be broken several ways without actual force. 1. If it be an act against the constitution or civil government. 2. If it be against religion; and 3d, if against morality. It is a libel if it reflects upon religion, that great basis of civil government, and may be both a spiritual and temporal offence. The cases we have noticed before, and particularly Taylor's case, are quoted in support of this principle, and also two cases (the particulars of which are not reported) of punishment, for buffooning or writing libels about the Trinity, in which this principle, it is observed, was not made a doubt of, and in which, as Lord Raymond in the next case of the King against Woolston, observed, 'it had been settled, that to write against Christianity, *in general*, was an offence.'"

The Chief Justice is then reported to have said, in deciding the question "If it reflects on religion, virtue, or morality, if it tends to disturb the civil order of society, I think it is a temporal offence." And Probyn, Just. "inclined this to be punishable at common law, as an offence against the peace, in tending to weaken the bonds of civil society, virtue and morality."

The next case is the famous one of Rex *v.* Woolston, likewise before Raymond, 2 Strange 834. The defendant had been convicted on four informations for blasphemous discourses, denying the miracles of our Saviour; and the court there declared they would not suffer it to be debated, whether to write against Christianity *in general* was not an offence at common law punishable in the temporal courts, it having been so settled in the cases above-mentioned. "They desired, however,

it might be taken notice of that they laid their stress on the word *general*, and did not intend to include disputes among learned men upon particular controverted points." The same case is reported in Fitzgibbons, 64, and there it appears the question was debated at considerable length, whether this was an offence in the temporal courts, and also, whether the prosecution ought not to have been under the statute 9 and 10 Wm. III. c. 32. Raymond is there reported to have said, "Christianity *in general* is parcel of the common law of England, and therefore to be protected by it. Now, whatever, strikes at the very root of Christianity tends manifestly to a dissolution of the civil government, and so was the opinion of my Lord Hale in Taylor's case." "I would have it taken notice of, that *we do not meddle with any difference of opinion, and that we interpose only where the very root of Christianity itself is struck at, as it plainly is by this allegorical scheme, the New Testament and the whole relation of the life and miracles of Christ being denied.*" "As to 9 and 10 Wm. III., it is true, where a statute introduces a new offence and inflicts a new punishment, it must be followed ; but where it only inflicts a new punishment for an offence at common law, it remains an offence as it was before. Forgery, notwithstanding 5 Eliz., remains punishable as it was before."

In the King *v.* Annett, Blackst. Rep. 395, the same doctrine was held in a prosecution "for writing 'The Free Inquirer,' in which it was contended, that Moses was an impostor," &c. And the last case I shall mention is, that of the King v. Williams, for publishing Paine's Age of Reason, in which Ashhurst, in giving the judgment of the court, said, "It was fit to shew our abhorrence of such wicked doctrines, which were not only an offence against God but against all law and government, *from the direct tendency to dissolve all the bonds and obligations of civil society. It was upon this ground that the Christian religion constituted part of the law of England.* But if the name of our Redeemer was suffered to be traduced and his holy religion treated with contempt, the solemnity of an oath, on which the due administration of justice depended, would be destroyed, *and the law be stripped of one of its principle sanctions—the dread of future punishment.*"

We have gone through the cases on this head of the common law, and I think it would be a waste of time to say, what must be quite clear, that the simple impugning of the doctrine of the Trinity does not in the least touch upon the principle upon which these cases have been decided, and upon which alone courts of justice can interfere, viz. that the Christian religion in general is to be protected by the State, as one of its main supports, without entering at all upon questions which do not affect its influence as a bond of moral obligation and civil society. The statute 19 Geo. III. would never have contented itself with requiring the simple declaration of belief that the Scriptures contain the revealed will of God, if that belief had not been thought to be as much as ought to be required for the purposes of civil government. It seems, however, that we are perfectly justified in observing with Mr. Holt, that the *manner* of the attack must be essential in determining what cases are properly within the cognizance of our courts ; and indeed, the difficulty of saying that a sober argument upon the evidences of the Christian religion was punishable if it leaned against the belief in the truth of that dispensation, seems to have been felt, and to have given rise to the legislative enactment which it was thought expedient to make by the 9 and 10 Wm. III. c. 32, whereby penalties are inflicted on all persons who, *having been educated in, or made profession of Christianity,* for it extends to no other persons but apostates, shall deny the divine authority of the Scriptures, &c. ; which enactment puts a total stop to *all* argument of that kind, in whatever manner conducted, in the case of persons who had been professors of the Christian faith.

The manner seems, in many cases, indeed, to determine the question of offence altogether, for it is quite clear that lampoons, or indecent and scurrilous attacks upon the established religion, or upon points of its faith, in discussing

which there is no question but every person is tolerated and protected, are punishable like all other libels, as an outrage upon society and a breach of the peace (as in the case of buffooning the Trinity, above-noticed); and when it is considered to what lengths the courts have gone on the head of libel, as it affects political institutions and the character of individuals, in considering even truth itself, in many cases, as improper to be conveyed to the public, when scandalous to individuals and tending to a breach of the peace, it will appear that cases in which persons have been punished for indecent and scurrilous attacks upon the doctrines, ceremonies, or worship of the established church, or any other body of individuals, are no proof at all that the argument, if properly and decently managed, would have been in the least degree amenable to, or cognizable by the temporal courts. It would perhaps be better if they refrained from interfering at all on these subjects, and Dr. Furneaux has very well argued that point; but on the other hand, it trenches, very little, if at all, on free discussion, and it seems to follow as a natural consequence when once the legislature has thought proper to endow and establish one sect in preference to another, that its ordinances should be protected from insult, especially when that legislature has protected Dissenters from all interruption in the exercise of their own worship and ceremonies.

The only point remaining seems to be to consider whether the stat. of 9 and 10 Wm. III. can be considered as conclusive evidence, or as an existing declaration on the part of the legislature, that impugning the doctrine of the Trinity was, and is an offence at common law; and this, I suppose, will be maintained by contending that it is declared by the statute to be blasphemy.

Now, in the first place, the act does, only by implication, apply that epithet, or any other epithet of offence cognizable at common law, to the impugning of the doctrine of the Trinity. It recites, that many persons had of late maintained many blasphemous and impious opinions, contrary to the doctrines and principles of the Christian religion, greatly tending to the dishonour of God, &c.; and for the more effectually suppressing such detestable crimes, the impugning the doctrine of the Trinity, the maintaining that there are more Gods than one, and the denying of the divine authority of the Scriptures by Christians, are prohibited under certain penalties. But in the second place, if it is clear that this offence is pronounced blasphemy by the act, it would only lead to an inquiry, what is blasphemy at common law, and whether all blasphemies are cognizable by it. Now it seems quite clear that heresy and blasphemy are nearly synonymous terms in the ecclesiastical courts, though it is admitted on all hands that heresies are not cognizable at common law. Without attempting to define the legal import of the word blasphemy, which is comparatively new in the common law courts, and does not appear to have in itself any very precise or determinate signification, it is sufficient to observe, that it is perfectly evident from all the authorities on the subject, that only such blasphemies come within the principle laid down for the jurisdiction of the temporal courts as affect the power and moral attributes of God, by denying his being and providence, or the revelation of his will to man, so as to impair our reverence of him, and weaken the bond of moral obligation.

If then the legislature has only done here as it has done before, in repeated instances, viz. inflicted a temporal punishment "for the more effectually suppressing" a heresy or blasphemy in the spiritual courts, such enactment would furnish no argument in favour of the prior jurisdiction of the temporal court over the offence; but the necessity of such an enactment would, on the contrary, be rather an argument the other way, as it would not have been required if the temporal courts could punish without it.

If again it should be contended that this statute must be considered as a declaration of the legislature that these opinions are hostile to the Christian religion *in general*, and therefore within the scope of temporal jurisdiction, it is to be ob-

served, that to put this construction upon such an act after its repeal, would be contrary to the principles by which our law has viewed other penal laws on religious subjects, which, when prohibiting opinions which it was thought at the time expedient to suppress, have never been nice in applying epithets which no one has even thought declaratory of the law on the subject when the enactment is repealed, to which the denomination of the offence meant to be suppressed is merely ancillary. It surely can never be seriously contended that the old penal laws, which are to be found on our statute book, declaring all sorts of opinions in their turns impious, heretical, blasphemous, felonious, &c., are declarations of their criminality in those respects, after the penalties have been long ago swept away. It is quite clear (though in the case of many of these statutes the legislature has not gone so far, as it has in our case, to *repeal* but merely to suspend the penalty) yet that the acts of toleration are considered as making the worship, which had been prohibited by the old statutes, innocent and lawful.

Who that reads Lord Mansfield's and Mr. Justice Foster's speeches on Evans's case, or appeals to common sense, can for a moment conceive that when Unitarians are protected by the toleration acts in their worship, when the ecclesiastical courts are prohibited from prosecuting and the penal enactment against them is repealed, such enactment is to be considered as authorising the temporal courts to prosecute us for what we are expressly protected in exercising, and in inflicting on us a punishment heavier than the express enactment imposed?

The Liverpool prosecution against Mr. Wright we see is abandoned; and when so much zeal was manifested in the first proceeding, it is not likely that after the parties had so committed themselves they would have desisted if they had not been advised that an indictment would not lie. It only remains to add a few words on the last, and indeed, the only case in which this question has been started in a court of justice, and this we may certainly consider the unkindest act of all, inasmuch as it is raised against us by brother Dissenters.

One would have thought it was enough for the Orthodox Dissenters to reflect, that their body had once so far forfeited their claim to the title of advocates of religious liberty, as to be instrumental in excluding their Anti-trinitarian brethren from the pale of toleration; and it cannot but be strange to see part of their body (after the legislature has opened the door to us) the first to contend that the indulgence is a dead letter, and to contest the grand principle on which their own liberties and privileges mainly rest, viz., that when the punishment imposed by the law has ceased, the crime ceased with it.

Of the ground on which Mr. Shadwell argued that Unitarianism was indictable at common law, every one can now fully judge. The reader will learn from Justice Ashhurst, *the ground on which the Christian religion forms part of the law of England*, and he will observe, that if by the Christianity which Hale and Raymond speak of protecting, we are to understand the Church of England, or any thing but the simple belief in the revelation through Christ, of the will of God to man, and the divine authority of the Scriptures, we are merely reviving the old law of heresy, and making it of temporal, not spiritual jurisdiction: all which has been most carefully guarded against by the great Judges from whose words was taken the garbled proposition upon which the argument was built. The Statute 19 Geo. III. is of itself decisive evidence, that the simple belief in the revelation of the will of God, and the divine authority of the Scriptures, is all that the law requires or considers essential for temporal purposes.

With regard to the principal conductor of the cause to which I am now alluding,* whose name we all justly venerate, and are, therefore, sorry to see so engaged, I can only hint here (though I think it due to him and ourselves to go so far), that he and the reporter of that case are, in some measure, at issue as to the argument used by him on that occasion; but I am happy to add, that it arises

* Sir Samuel Romilly.

from the disavowal, on his part, of all adoption or use on that occasion, of the notion, that impugning the doctrine of the Trinity is an offence at common law; and that it was with surprise and indignation he then, for the first time, heard of the prosecution which proceeded on that notion. The argument which he used, as counsel in that case, was rested, it is said, by him on the ground that (although the maintenance of these opinions be tolerated, and no longer punishable), yet there still remains enough offence to prevent the Court of Chancery from protecting their institutions by administering their trusts.

This argument, it will be observed, is one that would have prevented the Court of Chancery from administering any Dissenting trust, and applies to us only in common with all Dissenters. The common law offence being given up, the whole argument, as it affects Unitarians, distinct from the general body is given up; and we shall not be afraid to contend that Lord Mansfield and the several Judges who have disallowed it, were justified in so doing, particularly as we should then have to maintain our proposition in common with our brethren, who have so kindly brought us into the dilemma.

II.

TWO LETTERS FROM SIR SAMUEL ROMILLY TO DR. CHARLES LLOYD.*

Sir Samuel Romilly to Dr. Charles Lloyd.

"Russell Square, *Aug.* 2, 1817.

"Dear Sir,

"I am much obliged to you for calling my attention to the account given in the 'Monthly Repository' of what passed lately in the Court of Chancery relative to a chapel at Wolverhampton. The gentleman who has given an account of these proceedings is certainly mistaken in stating that I argued, that impugning the doctrine of the Trinity was an offence at common law originally, and has continued so after the repeal of the Acts. I maintained no such doctrine; and it was with great surprise and some indignation that I heard from Mr. Shadwell that there were some prosecutions now depending, which proceed upon the notion that there is such a common-law offence. All that I argued (and I cannot but think that it was necessary to the decision of the case) was, that a legacy for the purpose of propagating the doctrine of Unitarianism would not be established by the Court of Chancery; and to that proposition the Chancellor, as I understood him, assented. It was decided by Lord Hardwicke, and his decision has been acted upon by succeeding Chancellors, that legacies given by Jews for reading lectures on the Hebrew Law in their synagogues would not be established by the Court of Chancery; but there is a great difference between this and maintaining that a Jewish priest is indictable for teaching the Jewish law.

"I remain, dear Sir, with great respect and esteem, your most obedient servant,

"Samuel Romilly."

* These were published in 1849, in the "Memoir of Rev. Robert Aspland," pp, 382, 383—time having removed all objection to their publication.

"Russell Square, *Aug.* 10, 1817.

"Dear Sir,

"There is nothing I wish less than to have it established that the opinion which, as counsel in the case of the Wolverhampton Chapel, I expressed, is correct. It would, on the contrary, give me very great pleasure to find that I was mistaken. I am sorry, however, to say Mr. E. Taylor's arguments have not convinced me that I was. He cannot understand how it can be maintained that the Court of Chancery will not administer a trust for Unitarian worship, unless Unitarianism be an offence indictable at common law. But surely, as a lawyer, he must know that there are many acts which are so illegal that courts of justice will give no countenance to them, although they do not amount to indictable offences. It is illegal to trade with an enemy's country during time of war, and courts of justice refuse on that ground to enforce contracts which arise out of such a trade; and yet no one imagines that a man could be indicted for engaging in such a trade, or for underwriting policies of insurance on goods or ships employed in it. I am, however, not at all disposed to enter into any argument in defence of my opinion. When I said that I thought the Chancellor assented to it, I alluded, not to anything said by him in his judgment, but to his having nodded assent to the proposition at the time it was stated. I am very sorry that my argument should have been mistaken, and therefore misstated; but it is a misfortune I would rather submit to than have this or my former letter published. Such a publication might lead to a controversy, which would be to me a very odious one, if I had to maintain a doctrine which it would give me very sincere pleasure to see refuted.

"I remain, dear Sir, with great respect and esteem, yours, &c.,

"S. Romilly."

III.

ACCOUNT OF PROCEEDINGS IN THE HOUSE OF LORDS IN CHAMBERLAIN OF LONDON *v.* EVANS.*

SPEECH OF LORD MANSFIELD IN THE HOUSE OF LORDS, IN THE CAUSE BETWEEN THE CITY OF LONDON AND THE DISSENTERS.

It is proper the reader should be apprized, previous to the perusal of the following Speech, that in 1748, the corporation of London made a bye-law, with a view, as they alleged, of procuring fit and able persons to serve the office of sheriff of the said corporation; imposing for that end a fine of £400 and twenty marks upon every person who, being nominated by the lord mayor, declined standing the election of the common hall; and £600 upon every one who, being elected by the common hall, refused to serve the office. Which fines they appropriated to defraying the expense of building the Mansion House.

Many Dissenters were nominated and elected to the said office, who were incapable of serving; it having been enacted by the Corporation Act (13 Car. 2, stat. 2, c. 1), that no person should be elected into any corporation offices, who had not taken the sacrament in the church of England within a year preceding the time of such election; and several of them accordingly paid their fines, to the amount of above £15,000. Some at length refused to pay their fines,

* Reprinted from 16 Parl. History.

apprehending they could not be obliged, by law, to fine for not serving an office to which they were, by law, uneligible. The city, therefore, brought actions of debt against them in a court of their own, called the Sheriffs' Court, for the recovery of those fines. After many delays the cause came to a hearing in the case of Allen Evans, Esq., and judgment was given for the plaintiff in September, 1757. The defendant Evans brought the cause before the Court of Hustings, another city court, to which an appeal lay; and the judgment was there affirmed by the Recorder in the year 1759. The defendant then, by writ of error, brought the cause before the court of judges delegates, called the Court of St. Martin's: the delegates were, Lord Chief Justice Willes, Lord Chief Baron Parker, Mr. Justice Foster, Mr. Justice Bathurst, and Mr. Justice Wilmot. Lord Chief Justice Willes dying before judgment was given, the rest of the delegates delivered their opinions *seriatim*, July 5, 1762, and unanimously reversed the judgment of the Sheriffs' Court, and Court of Hustings. The corporation then, by writ of error, brought the cause before the House of Lords, when all the Judges who had not sat as delegates, except Mr. Justice Yates, who was ill, gave their opinions *seriatim*, Feb. 3rd and 4th, 1767, upon a question put to them by the House. After which Lord Mansfield, in his place as a peer, made the following Speech.

It is proper, however, as an introduction to it, to prefix the question which the House of Lords put to the Judges; as also their Opinions upon it: a question which the noble lord who moved it hath worded with such precision, that it is hardly possible the point on which the cause turns should be mistaken on any future occasion.

January 22, 1767. Counsel, according to order, were called in to be farther heard in the cause upon a writ of error brought into this House, wherein the Chamberlain of the city of London is plaintiff, and Allen Evans, Esq., defendant; and the counsel for the defendant having been heard, as also one counsel for the plaintiff by way of reply, the counsel were directed to withdraw. And it being proposed, that the Judges be directed to deliver their opinions upon the following question:

Q. Whether, upon the facts admitted by the pleadings in this cause, the defendant is at liberty, or should be allowed to object to the validity of his election on account of his not having taken the sacrament according to the rites of the church of England within a year before, in bar of this action?

The same was agreed to, and the said question was accordingly put to the Judges.

Whereupon the Judges desiring some time might be allowed them for that purpose,

Ordered, That the farther hearing of the said cause be adjourned till Tuesday next; and that the Judges do then attend to deliver their opinions upon the said question.

January 27. The order of the day being read for the farther hearing of the said cause, the Lord Chancellor acquainted the House, that the Judges differed in their opinions, and that they desired that farther time might be allowed them for giving their opinions upon the said question.

Ordered, That the farther hearing of the said cause be adjourned to this day sevennight; and that the Judges do then attend to deliver their opinions upon the said question.

February 3. The order of the day being read for the farther hearing of the said cause, and for the Judges to deliver their opinions upon the question proposed to them on Thursday the 22nd of January, the Lord Chancellor acquainted the House, that the Judges differed in their opinions; and thereupon they were directed to deliver their opinions *seriatim*, with their reasons.

Accordingly, Mr. Justice *Hewitt* was heard, and gave his reasons, and con-

cluded with his opinion, That the defendant is at liberty, and should be allowed to object to the validity of his election, on account of his not having taken the sacrament according to the rites of the church of England within a year before, in bar of this action.

Mr. Justice *Aston* heard, and was of the same opinion, and gave his reasons.

Mr. Baron *Perrott* heard, and gave his reasons, and concluded with his opinion, That the defendant is not at liberty, nor ought to be allowed to object to the validity of his election on account of his not having taken the sacrament according to the rites of the church of England within a year before, in bar of this action.

Mr. Justice *Gould* heard, and was of the same opinion as Mr. Justice Aston, and gave his reasons.

Ordered, That the farther consideration of the said cause be adjourned till to-morrow ; and that the Judges do then attend.

February 4. The order of the day being read for the farther hearing of the said cause, and for the Judges to attend,

Mr. Baron *Adams* was heard, and gave his reasons, and concluded with his opinion, that the defendant is at liberty, &c.

Mr. Baron *Smythe* heard, and was of the same opinion, and gave his reasons.

Mr. Justice *Clive* heard, and was of the same opinion, and gave his reasons.

As soon as the Judges had given their opinions, Lord Mansfield made the following Speech :

LORD MANSFIELD'S SPEECH in the House of Lords, in the Case of the Chamberlain of London against Allen Evans, Esq.

My lords ; as I made the motion for taking the opinion of the learned judges, and proposed the question your lordships have been pleased to put to them, it may be expected that I should make some farther motion, in consequence of the opinions they have delivered.

In moving for the opinion of the Judges I had two views : the first was, that the House might have the benefit of their assistance, in forming a right judgment in this cause now before us, upon this writ of error : the next was, that, the question being fully discussed, the grounds of our judgment, together with their exceptions, limitations, and restrictions, might be clearly and certainly known, as a rule to be followed hereafter in all future cases of the like nature : and this determined me as to the manner of wording the question, ' How far the defendant might, in the present case, be allowed to plead his disability in bar of the action brought against him ? '

The question, thus worded, shews the point upon which your lordships thought this cause turned ; and the answer necessarily fixes a criterion, under what circumstances, and by what persons, such a disability may be pleaded, as an exemption from the penalty inflicted by this bye-law, upon those who decline taking upon them the office of sheriff.

In every view in which I have been able to consider this matter, I think this action cannot be supported.

If they rely on the Corporation Act—by the literal and express provision of that act no person can be elected, who hath not within a year taken the sacrament in the church of England ; the defendant hath not taken the sacrament within a year ; he is not therefore elected. Here they fail.

If they ground it on the general design of the legislature in passing the Corporation Act, the design was to exclude dissenters from office, and disable them from serving. For in those times, when a spirit of intolerance prevailed, and severe measures were pursued, the dissenters were reputed and treated as persons ill affected and dangerous to the government : the defendant therefore, a dis-

senter, and in the eye of this law a person dangerous and ill affected, is excluded from office, and disabled from serving. Here they fail.

If they ground the action on their own bye-law, since that bye-law was professedly made to procure fit and able persons to serve the office, and the defendant is not fit and able, being expressly disabled by statute law: here too they fail.

If they ground it on his disability being owing to a neglect of taking the sacrament at church, when he ought to have done it; the Toleration Act having freed the dissenters from all obligation to take the sacrament at church, the defendant is guilty of no neglect, no criminal neglect. Here, therefore, they fail.

These points, my lords, will appear clear and plain.

The Corporation Act, pleaded by the defendant as rendering him uneligible to this office, and incapable of taking it upon him, was most certainly intended by the legislature to prohibit the persons therein described being elected to any corporation offices, and to disable them from taking such offices upon them. The act had two parts: first, it appointed a commission for turning out all that were at that time in office, who would not comply with what was required as the condition of their continuance therein, and even gave a power to turn them out, though they should comply: and then it farther enacted, that from the termination of that commission no person hereafter, who had not taken the sacrament according to the rites of the church of England within one year preceding the time of such election, should be placed, chosen, or elected, into any office of or belonging to the government of any corporation: and this was done, as it was expressly declared in the preamble to the act, in order to perpetuate the succession in corporations in the hands of persons well affected to the government in church and state.

It was not their design, as hath been said [by Mr. Baron Perrott], 'to bring such persons into corporations, by inducing them to take the sacrament in the church of England;' the legislature did not mean to tempt persons, who were ill affected to the government, occasionally to conform: it was not, I say, their design to bring them in; they could not trust them, lest they should use the power of their offices to distress and annoy the state. And the reason is alleged in the act itself; it was because there were 'evil spirits' amongst them; and they were afraid of evil spirits, and determined to keep them out: and therefore they put it out of the power of electors to choose such persons, and out of their power to serve; and accordingly prescribed a mark or character, laid down a description whereby they should be known and distinguished by their conduct previous to such election; instead of appointing a condition of their serving the office, resulting from their future conduct, or some consequent action to be performed by them; they declared such persons incapable of being chosen, as had not taken the sacrament in the church within a year before such election; and without this mark of their affection to the church, they could not be in office, and there could be no election.

But as the law then stood, no man could have pleaded this disability, resulting from the Corporation Act, in bar of such an action as is now brought against the defendant; because this disability was owing to what was then in the eye of the law a crime; every man being required by the canon law, received and confirmed by statute law, to take the sacrament in the church at least once a year: the law would not permit a man to say, that he had not taken the sacrament in the church of England; and he could not be allowed to plead it in bar of any action brought against him.

But the case is quite altered since the Act of Toleration: it is now no crime for a man, who is within the description of that act, to say he is a dissenter; nor is it any crime for him not to take the sacrament according to the rites of the

church of England: nay, the crime is, if he does it contrary to the dictates of his conscience.

If it is a crime not to take the sacrament at church, it must be a crime by some law; which must be either common or statute law, the canon law inforcing it depending wholly upon the statute law. Now the statute law is repealed as to persons capable of pleading that they are so and so qualified; and therefore the canon law is repealed with regard to those persons. If it is a crime by common law, it must be so either by usage or principle. There is no usage or custom, independent of positive law, which makes nonconformity a crime. The eternal principles of natural religion are part of the common law: the essential principles of revealed religion are part of the common law; so that any person reviling, subverting, or ridiculing them, may be prosecuted at common law. But it cannot be shewn from the principles of natural or revealed religion, that, independent of positive law, temporal punishments ought to be inflicted for mere opinions with respect to particular modes of worship.

Persecution for a sincere, though erroneous, conscience, is not to be deduced from reason or the fitness of things; it can only stand upon positive law.

It hath been said [by Mr. Baron Perrott,] that 'the Toleration Act only amounts to an exemption of Protestant Dissenters from the penalties of certain laws therein particularly mentioned, and to nothing more; that if it had been intended to bear, and to have any operation upon the Corporation Act, the Corporation Act ought to have been mentioned therein; and there ought to have been some enacting clause, exempting Dissenters from prosecution in consequence of this Act, and enabling them to plead their not having received the sacrament according to the rites of the church of England, in bar of such action.' But this is much too limited and narrow a conception of the Toleration Act; which amounts consequentially to a great deal more than this; and it hath consequentially an influence and operation upon the Corporation Act in particular. The Toleration Act renders that which was illegal before, now legal; the Dissenters' way of worship is permitted and allowed by this act; it is not only exempted from punishment, but rendered innocent and lawful; it is established: it is put under the protection, and is not merely under the connivance, of the law. In case those who are appointed by law to register dissenting places of worship, refuse on any pretence to do it, we must, upon application, send a mandamus to compel them.

Now there cannot be a plainer position, than that the law protects nothing, in that very respect in which it is in the eye of the law, at the same time, a crime. Dissenters, within the description of the Toleration Act, are restored to a legal consideration and capacity; and an hundred consequences will from thence follow, which are not mentioned in the Act. For instance, previous to the Toleration Act, it was unlawful to devise any legacy for the support of dissenting congregations, or for the benefit of dissenting ministers; for the law knew no such assemblies, and no such persons; and such a devise was absolutely void, being left to what the law called superstitious purposes. But will it be said in any court in England, that such a devise is not a good and valid one now? And yet there is nothing said of this in the Toleration Act. By that act the Dissenters are freed, not only from the pains and penalties of the laws therein particularly specified, but from all ecclesiastical censures, and from all penalty and punishment whatsoever on account of their nonconformity; which is allowed and protected by this act, and is therefore in the eye of the law no longer a crime. Now if the defendant may say he is a Dissenter; if the law doth not stop his mouth; if he may declare, that he hath not taken the sacrament according to the rites of the church of England without being considered as criminal; if, I say, his mouth is not stopped by the law, he may then plead, his not having taken the sacrament according to the rites of the church of Eng-

land, in bar of this action. It is such a disability as doth not leave him liable to any action, or to any penalty or punishment whatsoever.

It is, indeed, said [by Mr. Baron Perrott] to be 'a maxim in law, that a man shall not be allowed to disable himself.' But when this maxim is applied to the present case, it is laid down in too large a sense; I say, when it is extended to comprehend a legal disability, it is taken in too great a latitude. What! shall not a man be allowed to plead, that he is not fit and able. These words are inserted in the bye-law, as the ground of making it; and in the plaintiff's declaration, as the ground of his action against the defendant: it is alleged, that the defendant was fit and able, and that he refused to serve, not having a reasonable excuse. It is certain, and it is hereby in effect admitted, that if he is not fit and able, and that if he hath a reasonable excuse, he may plead it in bar of this action. Surely he might plead, that he was not worth £15,000 provided that was really the case, as a circumstance that would render him not fit and able. And if the law allows him to say, that he hath not taken the sacrament according to the rites of the church of England, being within the description of the Toleration Act; he may plead that likewise, to shew that he is not fit and able; it is a reasonable, it is a lawful excuse.

My lords, the meaning of this maxim, 'That a man shall not disable himself,' is solely this, that a man shall not disable himself by his own wilful crime: and such a disability the law will not allow him to plead. If a man contracts to sell an estate to any person upon certain terms at such a time, and in the meantime he sells it to another; he shall not be allowed to say, Sir, I cannot fulfil my contract; it is out of my power; I have sold my estate to another. Such a plea would be no bar to an action, because the act of his selling it to another is the very breach of contract. So likewise a man, who hath promised marriage to one lady, and afterwards marries another, cannot plead in bar of a prosecution from the first lady, that he is already married; because his marrying the second lady is the very breach of promise to the first. A man shall not be allowed to plead, that he was drunk, in bar of a criminal prosecution, though, perhaps, he was at the time as incapable of the exercise of reason as if he had been insane; because his drunkenness was itself a crime: he shall not be allowed to excuse one crime by another. The Roman soldier, who cut off his thumbs, was not suffered to plead his disability for the service, to procure his dismission with impunity; because his incapacity was designedly brought upon him by his own wilful fault. And I am glad to observe so good an agreement among the Judges upon this point, who have stated it with great precision and clearness.

When it was said, therefore, that 'a man cannot plead his crime, in excuse for not doing what he is by law required to do;' it only amounts to this, that he cannot plead in excuse what, when pleaded, is no excuse: but there is not in this the shadow of an objection to his pleading what is an excuse, pleading a legal disqualification. If he is nominated to be a justice of the peace, he may say, I cannot be a justice of peace, for I have not a hundred pounds a year. In like manner, a Dissenter may plead, I have not qualified, and I cannot qualify, and am not obliged to qualify; and you have no right to fine me for not serving.

It has been said, that 'the king hath a right to the service of all his subjects.' And this assertion is very true, provided it be properly qualified. For surely, against the operation of this general right in particular cases, a man may plead a natural or civil disability. May not a man plead that he was upon the high seas? May not idiocy or lunacy be pleaded? which are natural disabilities: or a judgment of a court of law? and much more, a judgment of parliament; which are civil disabilities.

It hath been said to be 'a maxim, that no man can plead his being a lunatic,

to avoid a deed executed, or excuse an act done, at that time; because,' it is said, 'if he was a lunatic, he could not remember any action he did during the period of his insanity.' And this was doctrine formerly laid down by some judges; but I am glad to find, that of late it hath been generally exploded; for the reason assigned for it is, in my opinion, wholly insufficient to support it; because, though he could not remember what passed during his insanity, yet he might justly say, if he ever executed such a deed, or did such an action, it must have been during his confinement or lunacy; for he did not do it either before or since that time.

As to the case, in which a man's plea of insanity was actually set aside; it was nothing more than this: it was when they pleaded *ore tenus;* the man pleaded, that he was at the time out of his senses. It was replied, how do you know that you were out of your senses? No man that is so, knows himself to be so. And accordingly his plea was upon this quibble set aside; not because it was not a valid one, if he was out of his senses; but because they concluded, he was not out of his senses. If he had alleged, that he was at that time confined, being apprehended to be out of his senses; no advantage could have been taken of his manner of expressing himself; and his plea must have been allowed to be good.

As to Larwood's case; he was not allowed the benefit of the Toleration Act; because he did not plead it. If he had insisted on his right to the benefit of it in his plea, the judgment must have been different. His inserting it in his replication was not allowed, not because it was not an allegation that would have excused him, if it had been originally taken notice of in his plea, but because its being only mentioned afterwards was a departure from his plea.

In the case of the Mayor of Guildford, the Toleration Act was pleaded, the plea was allowed good, the disability being esteemed a lawful one, and the judgment was right.

And here the defendant hath likewise insisted on his right to the benefit of the Toleration Act in his plea; he saith he is *bonâ fide* a Dissenter, within the description of the Toleration Act; that he hath taken the oaths, and subscribed the declaration required by that act, to shew that he is not a Popish recusant; that he hath never received the sacrament according to the rites of the church of England, and that he cannot in conscience do it; and that for more than fifty years past he hath not been present at church at the celebration of the established worship; but hath constantly received the sacrament, and attended divine service, among the Protestant Dissenters. And these facts are not denied by the plaintiff; though they might easily have been traversed, and it was incumbent upon them to have done it, if they had not known they should certainly fail in it. There can be no doubt, therefore, that the defendant is a Dissenter, an honest conscientious Dissenter; and no conscientious Dissenter can take the sacrament at church; the defendant saith he cannot do it, and he is not obliged to do it. And as this is the case, as the law allows him to say this, as it hath not stopped his mouth, the plea which he makes is a lawful plea, his disability being through no crime or fault of his own; I say, he is disabled by act of parliament, without the concurrence or intervention of any fault or crime of his own; and therefore he may plead this disability in bar of the present action.

The case of, 'Atheists and Infidels' (objected by Mr. Baron Perrott) is out of the present question; they come not within the description of the Toleration Act. And this is the sole point to be enquired into, in all cases of the like nature with that of the defendant, who here pleads the Toleration Act: is the man *bonâ fide* a Dissenter within the description of that Act? If not, he cannot plead his disability in consequence of his not having taken the sacrament in the

church of England; if he is, he may lawfully, and with effect, plead it, in bar of such an action. And the question, on which this distinction is grounded, must be tried by a jury.

It hath been said (by Mr. Baron Perrott) that 'this being a matter between God and man's own conscience, it cannot come under the cognizance of a jury.' But certainly it may. And though God alone is the absolute judge of a man's religious profession, and of his conscience, yet there are some marks even of sincerity; among which there is none more certain than consistency. Surely a man's sincerity may be judged of by overt acts: it is a just and excellent maxim, which will hold good in this as in all other cases, 'By their fruits ye shall known them.' Do they—I do not say go to meeting now and then—but do they frequent the meeting house? Do they join generally and statedly in divine worship with dissenting congregations? Whether they do or not, may be ascertained by their neighbours, and by those who frequent the same places of worship. In case a man hath occasionally conformed for the sake of places of trust and profit: in that case, I imagine, a jury would not hesitate in their verdict. If a man then alleges he is a Dissenter, and claims the protection and the advantages of the Toleration Act, a jury may justly find, that he is not a Dissenter within the description of the Toleration Act, so far as to render his disability a lawful one: if he takes the sacrament for his interest, the jury may fairly conclude, that his scruple of conscience is a false pretence when set up to avoid a burden.

The defendant in the present cause pleads, that he is a Dissenter within the description of the Toleration Act; that he hath not taken the sacrament in the church of England within one year preceding the time of his supposed election, nor ever in his whole life; and that he cannot in conscience do it.

Conscience is not controlable by human laws, nor amenable to human tribunals. Persecution, or attempts to force conscience, will never produce conviction; and are only calculated to make hypocrites or martyrs.

My lords, there never was a single instance from the Saxon times down to our own, in which a man was ever punished for erroneous opinions concerning rites or modes of worship, but upon some positive law. The common law of England, which is only common reason or usage, knows of no prosecution for mere opinions: for atheism, blasphemy, and reviling the Christian religion, there have been instances of persons prosecuted and punished upon the common law; but bare non-conformity is no sin by the common law: and all positive laws inflicting any pains or penalties for non-conformity to the established rites and modes, are repealed by the Act of Toleration; and Dissenters are thereby exempted from all ecclesiastical censures.

What bloodshed and confusion have been occasioned from the reign of Henry the Fourth, when the first penal statutes were enacted, down to the Revolution in this kingdom, by laws made to force conscience! There is nothing certainly more unreasonable, more inconsistent with the rights of human nature, more contrary to the spirit and precepts of the Christian religion, more iniquitous and unjust, more impolitic, than persecution. It is against natural religion, revealed religion, and sound policy.

Sad experience, and a large mind, taught that great man, the president De Thou, this doctrine: let any man read the many admirable things which, though a Papist, he hath dared to advance upon the subject, in the dedication of his history to Harry the Fourth of France, which I never read without rapture; and he will be fully convinced, not only how cruel, but how impolitic, it is to persecute for religious opinions. I am sorry, that of late his countrymen have begun to open their eyes, see their error, and adopt his sentiments; I should not have broke my heart (I hope I may say so without breach of Christian charity), if France had continued to cherish the Jesuits, and to persecute the Huguenots.

There was no occasion to revoke the Edict of Nantes ; the Jesuits needed only to have advised a plan similar to what is contended for in the present case : make a law to render them incapable of office ; make another, to punish them for not serving. If they accept, punish them (for it is admitted on all hands, that the defendant in the cause before your lordships is prosecutable for taking the office upon him) : if they accept, punish them ; if they refuse, punish them ; if they say Yes, punish them ; if they say No, punish them.

My lords, this is a most exquisite dilemma, from which there is no escaping ; it is a trap a man cannot get out of ; it is as bad persecution as that of Procrustes : if they are too short, stretch them ; if they are too long, lop them. Small would have been their consolation to have been gravely told, the Edict of Nantes is kept inviolable ; you have the full benefit of that Act of Toleration ; you may take the sacrament in your own way with impunity : you are not compelled to go to mass.

Was this case but told in the city of London as of a proceeding in France, how would they exclaim against the jesuitical distinction ! and yet in truth it comes from themselves : the Jesuits never thought of it : when they meant to persecute, their Act of Toleration, the Edict of Nantes, was repealed.

This bye-law, by which the Dissenters are to be reduced to this wretched dilemma, is a bye-law of the city, a local corporation, contrary to an act of parliament, which is the law of the land ; a modern bye-law, of very modern date, made long since the Corporation Act, long since the Toleration Act, in the face of them ; for they knew these laws were in being. It was made in some year of the reign of the late king ; I forget which : but it was made about the time of building the Mansion-house. Now if it could be supposed the city have a power of making such a bye-law, it would entirely subvert the Toleration Act, the design of which was to exempt the Dissenters from all penalties ; for by such a bye-law they have it in their power to make every Dissenter pay a fine of £600, or any sum they please ; for it amounts to that.

The professed design of making this bye-law, was to get fit and able persons to serve the office : and the plaintiff sets forth in his declaration that if the Dissenters are excluded, they shall want fit and able persons to serve the office. But were I to deliver my own suspicion, it would be, that they did not so much wish for their services, as for their fines. Dissenters have been appointed to this office, one who was blind, another who was bedridden ; not, I suppose, on account of their being fit and able to serve the office. No ; they were disabled both by nature and by law.

We had a case lately in the courts below, of a person chosen mayor of a corporation, while he was beyond the seas, with his Majesty's troops in America ; and they knew him to be so. Did they want him to serve the office ? No ; it was impossible. But they had a mind to continue the former mayor a year longer, and to have a pretence for setting aside him who was now chosen, on all future occasions, as having been elected before.

In the cause before your lordships, the defendant was by law incapable at the time of his pretended election ; and it is my firm persuasion, that he was chosen because he was incapable. If he had been capable, he had not been chosen : for they did not want him to serve the office. They chose him, because, without a breach of the law and an usurpation on the crown, he could not serve the office. They chose him, that he might fall under the penalty of their bye-law made to serve a particular purpose : in opposition to which, and to avoid the fine thereby imposed, he hath pleaded a legal disability grounded on two acts of parliament. As I am of opinion that his plea is good, I conclude with moving your lordships, That the Judgment be affirmed."

The Judgment was immediately affirmed, *nem. con.*, and the entry made in the following words :

"It is ordered and adjudged by the Lords spiritual and temporal in parliament assembled, that the Judgment given by the commissioners delegates appointed to hear the errors in a judgment given in the Sheriffs' Court, London, and affirmed by the Court of Hustings, reversing the judgment of the Sheriffs' Court and Court of Hustings, be, and the same is hereby affirmed; and that the record be remitted."